Attitudinal Decision Making in the Supreme Court of Canada

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Attitudinal Decision Making in the Supreme Court of Canada

C.L. Ostberg and Matthew E. Wetstein

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This book is dedicated to our parents
Rosemarie Ostberg, Paul and Kate Wetstein,
and in loving memory of Donald Ostberg

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Acknowledgments

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Attitudinal Decision Making in the Supreme Court of Canada

1
Models of Judicial Behaviour and the Canadian Supreme Court

Twenty-five years after the addition of the *Canadian Charter of Rights and Freedoms* to the Constitution, academics, politicians, and Supreme Court watchers continue to debate the impact that the document has had on the high court and Canadian society. One ramification that is not disputed, however, is that the *Charter* has clearly placed the Court centre-stage in some of the most dramatic policy debates pertaining to issues such as gay rights, Aboriginal territorial claims, abortion, health care, and minority language rights. Given the Court's enhanced role in the political process, it is not surprising that justices on the bench are frequently at odds over how to resolve some of these high-stakes policy issues.

A prime example of judicial disagreement emerged in June 2005, when the Court released a divided ruling in a bitterly contested dispute over the constitutionality of Quebec's prohibition on private health insurance programs (see *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791 [*Chaoulli*]). The justices on the seven-member panel that decided the case took three distinct stances on the legal issues. Writing for the majority, Justice Deschamps struck down the Quebec ban because it forced citizens to endure extensive waiting periods in Canada's national health care program, thus infringing the right to life and personal inviolability guaranteed in Quebec's *Charter of Human Rights and Freedoms.* Three of her colleagues – Chief Justice McLachlin and Justices Major and Bastarache – would have gone further by ruling that the ban not only violated the provincial charter but also the citizens' rights to life, liberty, and security enshrined in section 7 of the *Canadian Charter of Rights and Freedoms.* Justices Binnie, LeBel, and Fish, in dissent, concluded that Quebec's private health care ban did not violate notions of fundamental justice because the waiting periods were not arbitrary in nature, and went on to suggest that the Court should not meddle in an affair that had already been resolved through protracted debate in various provincial and federal

elections (see *Chaoulli* at 860-61). Ultimately, the disagreement that emerged in this case reflects a larger trend of conflict that has become more commonplace in the post-*Charter* Court as it becomes increasingly embroiled in highly contentious issues that have a profound impact on the larger Canadian body politic.

If one analyzes the case from a political science perspective, one might ask: What was it about the *Chaoulli* case that triggered disagreement among the Canadian justices? Were their opinions animated by differences over the appropriate legal interpretation to give section 7 of the *Charter* when determining what constitutes a reasonable waiting period for publicly funded health care? Or were the justices at odds because they held differing ideological policy stances on the kinds of health care services that should be provided to Canadians? Or, alternatively, did some of the justices engage in strategic activity behind the red velour curtain that might have been critical to the development of the fractured ruling handed down by the Court? Clearly, each of these possibilities provides a viable explanation for the roots of the discord surrounding the health care debate that has emerged in the modern Canadian Supreme Court. Only further systematic research on the underlying sources of judicial conflict will reveal the degree to which each explanation provides an accurate account of the motivating forces behind such disagreements.

The *Chaoulli* case is just one example in a long line of contested rulings that has prompted at least one member of the high court to publicly comment on the rifts within the Court. In a speech commemorating the twentieth anniversary of the *Charter,* Justice Iacobucci called on public law scholars to devote more attention to exploring the patterns of judicial conflict that have emerged on the Court in the post-*Charter* era (Iacobucci 2002). Since members of the Canadian Supreme Court have maintained a traditional allegiance to a norm of consensus, it is important to explore what factors have led to an increase in disagreement among the justices in recent years. The significance of Justice Iacobucci's request cannot go unnoticed, especially in light of the increasingly prominent role that the justices have come to play in the policy process. We believe that an understanding of how the justices arrive at their decisions, particularly highly contentious ones, is worth investigating because their rulings have such a dramatic and lasting impact on Canadian society. In addition, how the Court resolves a given dispute is critical because that ruling can have a dramatic impact on the way that similar legal disputes are framed in the lower courts, and how policy debates unfold

in provincial legislatures and in Parliament. Scholars should also explore the roots of judicial disagreements because it might help the Court, as an institution, understand how to cope with or limit potential strife in the future. Such analysis could also result in a reduction in divided rulings, which in turn can help shore up the Court's legitimacy and stature in a democratic society that is currently debating the appropriate role of the Court in a system predicated on parliamentary supremacy. More broadly, we believe that if researchers have a better understanding of what fosters conflict in the post-*Charter* era, it might provide a significant contribution to the development and refinement of a more global theory of decision making that is aimed at explaining judicial behaviour beyond the confines of a particular nation.

We believe that an examination of conflict in the post-*Charter* Court takes on even greater significance when viewed in light of a larger global transformation that is taking place on courts in a multitude of countries and those that decide transnational issues. According to Tate and Vallinder (1995) there is a "judicialization of politics" that is occurring in high courts around the world, putting them centre-stage in the resolution of significant policy disputes. These scholars contend that the global transformation of courts is due to a number of factors, including the fall of communism, movement toward democratization by various states, and the increased influence of American legal jurisprudence on these emerging democracies (5, 2-3). They stipulate that this worldwide phenomenon constitutes "one of the most significant trends in late 20th and early 21st Century government" (5). Given the heightened profile of courts, it is not surprising that citizens have increasingly used them as a forum for settling divisive individual rights claims that necessarily have important political, social, and moral ramifications for society as a whole. Since high courts are becoming central institutions of policy-making power, it is imperative that comparative scholars systematically analyze what creates, exacerbates, and diminishes strife among members of these institutions. In short, the political, social, and institutional roots of conflict that divide high court justices should become a prominent subject of inquiry for comparative scholars worldwide.

The global trend toward more politicized and powerful courts raises a critical theoretical question: Do high courts of common law heritage have similar decision-making patterns? This question deserves careful examination and scrutiny because if so, then perhaps one overarching theory of judicial behaviour may be developed that can systematically explain the bulk of conflict that emerges between justices within and across a myriad

of democratic high courts. In order to explore this question, one must assess the current literature to determine whether any theoretical paradigms exist that might facilitate such a cross-cultural analysis. We believe that the attitudinal model of judicial behaviour might serve as a viable overarching theory to explain decision making across a multitude of high courts because a number of comparative studies throughout the years have successfully demonstrated the validity of its components in a sporadic fashion outside the US setting. No comparative research to date, however, has presented a systematic test of the model across multiple issue areas while simultaneously controlling for case facts, legal factors, and other rival variables. Our study represents a first step in this effort, and was motivated by the goal of testing the applicability of the attitudinal model in the Canadian context. Given the global judicialization of politics, we think it is crucial for comparative law scholars to begin conducting such systematic tests in high courts of other countries in an effort to develop a more complete and comprehensive theoretical model of judicial activity. In the pages that follow, we outline the contours of the attitudinal model and discuss rival theories of judicial decision making. We also provide a detailed sketch of the book and document some of the major findings of the study, most notably that patterns of ideological decision making in the Canadian Supreme Court have more complex, nuanced, and less polarized characteristics than the patterns found in its southern counterpart.

Competing Theories of Judicial Decision Making

Over the last fifty years, the attitudinal model has become one of the most prominent theoretical explanations for how justices arrive at their decisions (see Segal and Spaeth 1993, 2002). It draws its intellectual origins from rule skeptics, who, at the turn of the twentieth century, began questioning the long-held legal claim that justices merely find the law, rather than make it (Holmes 1881, 1897; Frank 1930; Fisher et al. 1993). In essence, these legal scholars believed that the written opinions of judges, which seem to follow the norms of precedent and the plain meaning of legal texts, simply act as a rationalization for advancing the justice's own beliefs and values in the cases they decide (see Llewellyn 1931, 1237; Segal and Spaeth 1993, 66). Ultimately, these legal realists called on social scientists to carefully analyze judicial rulings in order to better understand and predict the direction the law would take in the future (see Holmes 1897).

The behaviouralist revolution that took hold in the 1940s enabled political scientists to show that judicial policy preferences were critical factors that explained the rulings of individual judges. Pritchett's seminal work (1941, 1948) on the Roosevelt Court in the US stands as a hallmark of this early research; he demonstrated that political attitudes largely explained the non-unanimous decisions that were handed down by that court. His findings stimulated other behavioural pioneers, such as Schubert (1965, 1974), to utilize psychological scaling techniques on judicial votes to identify distinct underlying ideological dimensions at work in the decision-making process operating in two key areas of law. Schubert (1965, 122-23, 142-43) found that US Supreme Court justices followed a predictable ideological pattern of voting in economic cases that pitted economic underdogs against affluent interests – which he labelled the E-scale of ideological votes – and predictable lines in civil liberties cases that juxtaposed individual liberty claims against government's interest in maintaining traditional norms of social behaviour – which he labelled the C-scale of ideological votes.

Building on this foundation, subsequent attitudinalists, such as Spaeth and Peterson (1971), Rohde and Spaeth (1976), and Segal and Spaeth (1993, 2002), developed more comprehensive and coherent theoretical arguments for determining the extent to which political attitudes influence the judicial decision-making process. Like their predecessors, they believed that "the primary goals of Supreme Court justices in the decision making process are *policy goals,*" and that "when the justices make decisions they want to approximate as nearly as possible [their own] policy preferences" (Rohde and Spaeth 1976, 72). These scholars subsequently extended attitudinal theory by characterizing judicial outcomes as not only the product of the ideology of individual justices but also the result of attitudinal responses to specific case facts that can be triggered in different areas of law (Segal and Spaeth 1993, 73). Their analysis of US search and seizure cases from 1962 to 1989 indicated that measures of ideology and attitudinal responses to case facts could collectively predict 74 percent of the justices' votes in this area of law (Segal and Spaeth 1993, 230). Beyond this most explicit test of the attitudinal model, Segal and Spaeth (2002, Chapter 8) present a wealth of aggregate data that reinforce the idea that modern US justices are influenced by their ideology and that their voting patterns are relatively constant throughout their careers. Clearly, the various behavioural studies discussed above have gone a long way toward debunking the pervasive myth that judges simply

rely on legal texts, precedents, the intent of the framers of the Constitution and the toolbox of law school training to guide their judgments and written opinions.

The work of scholars like Schubert, Spaeth, and Segal has generated a virtual cottage industry of attitudinal studies exploring the significance of judicial ideology within different US courts and appellate courts around the world. Some of the earliest comparative attitudinal court scholarship was conducted by Schubert himself (1969a, 1969b, 1977, 1980), who was able to document ideological decision making in the high courts of Switzerland, Australia, and South Africa. His findings motivated other researchers, who have successfully shown that ideological conflict was evident in other court settings as well, including the Philippines (Samonte 1969; Flango and Schubert 1969; Tate 1995), Italy (DiFrederico and Guarnieri 1988); Japan (Dator 1969; Kawashima 1969; Danelski 1969), and Australia (Blackshield 1972; Galligan and Slater 1995; Power 1995). In Canada, Peck (1967a, 1967b, 1969) and Fouts (1969) published the first quantitative attitudinal studies demonstrating that the same kinds of liberal/conservative ideological dimensions at work in the US were also prominent on the Canadian high court. Subsequent behavioural scholarship by Tate and Sittiwong (1989) demonstrated that in addition to ideology, there were a host of judicial background characteristics that could explain judicial votes in economic and civil liberties disputes prior to the *Charter*'s adoption. Not surprisingly, the addition of the *Charter* has inspired a host of new studies exploring how the document has transformed the Supreme Court of Canada's institutional role in the Canadian policy process, and several of these studies are discussed further in Chapter 2. For present purposes, it is sufficient to say that this post-*Charter* research has documented an increase in attitudinal conflict between the Canadian justices, and suggests that attitudinal behaviour continues to operate unabated on the Court today (Songer and Johnson 2002; Ostberg, Johnson et al. 2004; McCormick 2000; Manfredi 1993, 2001; Epp 1998; Hausegger and Haynie 2003; Ostberg et al. 2002). Collectively, these comparative efforts have provided political scientists with a wealth of data demonstrating that attitudinal decision making occurs across time and place, and thus has real potential to serve as the core element in the development of a more global theory of judicial decision making in the future.

Despite the growing body of literature suggesting that ideological factors are at work in appellate courts outside the US context, the evidence has been compiled in a rather sporadic fashion in disparate issue areas across various

time periods and cultural contexts. Unfortunately, these studies, although fruitful, have given little or no consideration to systematically testing the viability of what we would call the *full-fledged* attitudinal model that simultaneously controls for the ideology of justices and specific case facts. If nothing else, Segal and Spaeth's prior research (1993, 2002) has shown us the importance of taking into consideration both the ideological leanings of the justices and the fact patterns that trigger attitudinal responses in order to more fully understand the situational dynamics that influence judicial rulings. The consideration of case facts, an element that is so integral to the application of their theory in different areas of law, has been largely ignored in the comparative public law literature and in most of the Canadian scholarship to date (for an exception, see Wetstein and Ostberg 1999). Given this lacuna in the literature, we believe that a systematic test of the full-fledged attitudinal model needs to be conducted in democratic courts around the world before it can achieve the status of a more global theory of judicial decision making. As it stands, many US scholars simply assume that the attitudinal model is a viable theory for explaining judicial behaviour in democracies outside the confines of the US, given the strength of its explanatory power in one of the most powerful democracies in the world. Our research begins to fill this gap in the literature by systematically testing the impact of fact patterns and ideology in six distinctive areas of law on the post-*Charter* Canadian Supreme Court. Our findings suggest that the attitudinal model provides a persuasive account of judicial decision making in Canada, which bodes well for its applicability in other democratic high courts around the world.

Although this book explores the relevance of the attitudinal model in Canada, we acknowledge that other theories of judicial behaviour may help explain how justices determine case outcomes. Two rival theories that deserve some comment are the legal model and the strategic/rational choice depiction of appellate court decision making. Advocates of the legal model, largely affiliated with law schools, claim that when justices engage in judicial review, they should abide by the plain meaning of the text of the constitution or statute in question, and not simply follow their own particular policy preferences (Ducat 2004; Segal and Spaeth 1993, 2002). Advocates of this perspective argue that justices remain untainted by political considerations because they simply apply rules in the constitution to the facts of a particular case. If justices are unable to decipher the plain meaning of the text, advocates of the legal approach claim that they should turn to the intent of the

framers for further constitutional and legal guidance. Moreover, supporters of the legal model contend that appellate justices should follow the legal norm of *stare decisis,* which ensures they adhere to legal rules established in prior cases containing similar factual circumstances (see Ducat 2004; Segal and Spaeth 1993, 2002; Esptein and Knight 1998). They claim that justices follow precedents in order to ensure that some consistency is maintained in the law. Ultimately, there is some legitimacy to particular aspects of the legal model, especially when precedents provide a clear roadmap for how a particular case should be resolved. If justices were to hand down inconsistent rulings in cases involving similar fact patterns, the public would no longer view justices as fair and unbiased arbiters of the law who are above politics; this, in turn, could undermine the legitimacy of the court. As such, precedents can serve as an important constraint on legal rulings because justices are wary of substituting their views when clear guidelines exist, and, as Epstein and Knight (1998, 45) point out, a "general norm favouring precedent exists in society at large."

Despite the foregoing discussion of the importance of abiding by precedent, one should note that first-level appellate court justices are far more likely to be constrained by previous rulings than their colleagues on courts of last resort, because of their institutional position in a hierarchical system of justice. Even though first-level appellate judges largely serve an error-correcting function, they are more likely to be norm enforcers because they are required to apply legal principles established by higher courts (see Songer et al. 1994; Neubauer and Meinhold 2004, 425). Moreover, since these judges hear cases that are largely a product of their mandatory jurisdiction, they often deal with relatively routine appeals that are fairly easy to resolve. According to Baum (2001, 274), "judges on these courts frequently express the view that most of their cases are easy to decide because the merits clearly lie on one side ... in effect, these judges are saying that the law is the dominant element in the courts' decision-making: most of the time, only one result can be justified under the law." In contrast, second-level appellate justices are not as readily constrained by the norm of precedent because their docket is mainly discretionary in nature (Baum 2001, 274-75). This, in combination with pressures from their heavy workload, makes them more likely to agree to hear more difficult cases that typically feature legitimate precedents on both sides of a given dispute. As Baum points out (2001, 275), "the law and the environment leave judges on second level courts with considerable freedom

to take the directions they wish in their decisions." Since cases that reach the Supreme Court contain precedents on both sides of the legal issue, attitudinalists have argued that US Supreme Court justices are free to simply select precedents that reflect their own point of view (Spaeth and Segal 1999, 290). The point to be drawn from this is that while matters of law remain dominant in determining the outcome of relatively easy first-level appellate court cases, attitudinal theorists would contend that policy preferences provide a more accurate account of the decision-making activity of justices serving on the highest court of the land.

A third theoretical model of judicial decision making that has gained prominence in recent years focuses on the relative importance of strategic interactions that take place between appellate justices during the decision-making process. According to advocates of this theory, since high court justices work in a small-group environment, their rulings are necessarily a product of justices engaging in a collegial bargaining process with eight other justices on the bench (see Epstein and Knight 1998, 10-18; Maltzman et al. 2000; Murphy 1964; Manfredi 2002). These scholars contend that justices must act strategically in relation to each other and relative to other political actors in the system if they are going to achieve their policy objectives. This theory is based on the assumption that in an effort to advance their own policy goals, high court justices must often accommodate the preferences of other members of the court. Since these justices usually need four other members to join their opinion to prevail in a case, they often engage in a calculated bargaining process in an effort to build a winning coalition (see Epstein and Knight 1998; Maltzman et al. 2000). This model recognizes that justices will often be forced to sacrifice their own ideal policy position in a case in order to persuade other justices to move in the direction of their preferred position (Maltzman et al. 2000, 17-18; Epstein and Knight 1998, 13). From a strategic standpoint, this approach recognizes that it is better for justices to win half a loaf than to lose the entire loaf. Ultimately, advocates of this theory, unlike attitudinalists, acknowledge that justices do not blindly pursue their own policy outcomes with a devil-may-care attitude; rather, they are more sophisticated actors in a small-group environment who must take into consideration the preferences of other actors in the decision-making process.

Collectively, these theories constitute three of the most prominent accounts used in explaining judicial decision making and conflict in US appellate courts. Although advocates of each theory might contend that their

perspective provides the best description of judicial behaviour, we believe that each of the approaches can be perceived as different layers of a large onion, with each sheath providing an added element of explanation for how justices arrive at their final legal outcomes. Along these same lines, Baum (1997) has suggested that each approach may explain to some extent the multiple and varied goals that US justices pursue. We believe that, like their US counterparts, justices of the post-*Charter* Canadian Supreme Court are bound to be influenced by both the strategic environment in which they work and a conscious desire to write opinions that are consistent with accepted legal doctrines. However, given the dominance of attitudinal theory in the US context, and the sporadic efforts to validate its presence in other high courts around the world, we believe that this model could play a central role in explaining judicial conflict within the post-*Charter* Canadian Court. As such, this book presents a systematic analysis of the full-fledged attitudinal model in multiple issue areas, not only to document its distinctive relevance in the Canadian context but also to advance the proposition, with some qualifications, that the model could serve as a viable link in the construction of a more global theory of judicial decision making.

There are several reasons why testing the applicability of the attitudinal model in the post-*Charter* Canadian context makes intuitive sense. First, the addition of the *Charter of Rights and Freedoms* to the Canadian Constitution in 1982 provided a unique and timely opportunity to analyze whether attitudinal decision making appears in a host of complex, highly charged areas of rights litigation that are winding up on Canada's high court docket. Second, given the host of similarities between Canada and the US, the Canadian Supreme Court represents an obvious first test case for systematically assessing the attitudinal model outside the confines of the US. The logic of this argument rests on the fact that since the two high courts have parallel institutional rules and norms, possess similar degrees of judicial independence within the broader political structure, and protect similar core rights provisions, attitudinal decision making is as likely in the Canadian context as it is in the US setting. We expand upon these themes more extensively in Chapter 2, and discuss various factors that might theoretically suppress attitudinal decision making in the Canadian high court as well. Despite the cultural and institutional differences between the two courts, we believe that the many similarities between the two institutions help explain why the attitudinal model has been a useful theoretical framework for describing decision making in the post-*Charter* era. Our findings indicate that its applicability

in the Canadian context, admittedly one of the easiest test cases, holds promise for its utility in more diverse democratic cultural settings.

As one might expect, some public law scholars have expressed concern over simply trying to import the liberal/conservative ideological divide that attitudinalists have found operating in US courts to assess decision-making patterns in disparate issue areas and in other court settings (see Ostberg et al. 2002, 236-37; Flango and Ducat 1977; Dudley and Ducat 1986; Ducat and Dudley 1987). One cannot assume that justices deciding cases in two distinct areas of law or in two different countries will necessarily be motivated by the same left/right dimensions of conflict. Given this valid criticism, some scholars have attempted to avoid this theoretical pitfall by utilizing factor analytic techniques to help identify the underlying values that trigger attitudinal disagreement in the US Supreme Court in economic cases (see Dudley and Ducat 1986; Ducat and Dudley 1987). Using this unique approach, these scholars let the majority and minority voting patterns in cases sort the justices' records on two different dimensions, and then identify the source of conflict underlying each dimension based on the patterns in the cases and the values that appear in the justices' opinions. Ultimately, this methodological approach prevents scholars from falling into the convenient trap of simply imposing the liberal/conservative construct so prominent in some areas of US law on the voting patterns in other areas of law, or on justices in high courts in other cultural settings. In light of this potential shortcoming, we initially conducted a prior factor analytic study on the *Charter* rulings of the Lamer Court (1991-95), and found that two of the three principal dimensions of conflict operating in *Charter* cases were rooted in a liberal/conservative divide between the justices (Ostberg et al. 2002, 251-52). In a subsequent study examining both *Charter* and non-*Charter* cases heard by the Lamer Court between 1993 and 1997, we demonstrated that a liberal/conservative divide was in fact the most important dimension of conflict between the justices in the three distinct areas of law analyzed in this book, namely, criminal, economic, and fundamental freedoms cases (Ostberg et al., n.d.). Taken together, these recent studies suggest that the same liberal/conservative tensions that are so prevalent in the US are also salient in the modern Canadian Supreme Court. Thus, it is not surprising that this book documents that ideological differences animate much of the decision making that takes place in several critical areas of law. Having said this, our most direct tests of the attitudinal model indicate that its applicability is less definitive and more subtle in the Canadian context than in the US Supreme Court.

Research Questions and Organization of the Book

Since we are examining the significance of the attitudinal model in the post-*Charter* Canadian context, the overarching research question for this book boils down to the following: What role do judicial ideology, case facts, and other control variables play in explaining the votes of justices, in both unanimous and non-unanimous cases, in distinct areas of law argued before the Court in the 1984–2003 period? More to the point, does judicial ideology play a more prominent role than other variables in our examination of judicial behaviour in the Supreme Court of Canada? Other significant research questions addressed in this book include: What areas of law spark the most attitudinal conflict in the Court? Do the justices from different ends of the ideological continuum respond differently to particular case facts? Do they exhibit stable and consistent ideological voting patterns over time and across issue areas? Are activist judges more likely to be found on one side of the ideological spectrum? Who acted as the intellectual leaders in the post-*Charter* era, and who were content to simply follow the lead of others? Conversely, who were the outsiders on the Court and were more willing to blaze their own legal trails? Does the gender or private legal experience of the justices influence the votes they cast in particular areas of law? What significant differences are found in the aggregate voting behaviour of the first three post-*Charter* courts? Answers to these questions are explored in detail in four key chapters (Chapters 4, 5, 6, and 7).

We chose to test the applicability of the attitudinal model in the 1984-2003 period because it comprises the first twenty years of rulings under the *Charter* and was a period in which greater rates of conflict emerged in the Canadian Supreme Court. Chapters 4, 5, and 6 analyze patterns of judicial behaviour in three distinct areas of law: criminal, civil rights and liberties, and economic cases, respectively. These areas of law were chosen because they represent obvious demarcations of prominent and distinct legal categories, and because they constitute the bulk of the Court's post-*Charter* docket. Each of these substantive chapters is divided into two main sections. The first is devoted to general statistics on *all* cases in a particular area of law, while the second provides an in-depth statistical test of the attitudinal model in two specific subfields of law, analyzing both unanimous and non-unanimous cases.

The test of the attitudinal model in these chapters involved the use of a mathematical equation estimating the probability that a justice would cast a liberal vote in a particular case. We were interested in determining the

relative importance of two key sets of variables – namely, the impact of a justice's perceived liberalism, and responses to case facts – while controlling for other variables in the model. The model included other potentially significant variables that assessed the influence of litigants, intervenors, and different periods of the post-*Charter* Court. The mathematical equation took the following form:

Probability of liberal vote = Constant + b_1 (justice's perceived ideology) +
b_2 (other justice characteristics: gender, private practice) +
b_3 (set of case facts) +
b_4 (set of parties and intervenors) +
b_5 (court control variables, e.g., McLachlin Court) +
e (unexplained variance)

This logistic regression model recognizes that judicial votes may be the product of various factors, and provides a sophisticated attempt to measure the extent to which justices' ideological values influence their votes while taking a host of other variables into consideration. When the justice-level ideology measure (b_1) has a statistically significant impact on the dependent variable (the probability of a liberal vote), then the model provides compelling evidence that attitudinal decision making is at work in the Supreme Court of Canada. When it is not significant, then ideological attitudes have less relevance in explaining judicial behaviour in a particular area of post-*Charter* litigation. The model also enabled us to test whether justices register attitudinal responses to the stimuli that case facts present. For example, in a criminal case, a justice might be more prone to cast a liberal vote in favour of the criminally accused in a circumstance where no right to counsel warning was given, as opposed to a case where officers gave proper notice of this procedural safeguard. Likewise, in the economic area, a justice may be more likely to favour union arguments in a situation where management has engaged in unfair labour practices, in contrast to a case lacking this factual circumstance. The equation also takes into consideration the effect of court control variables in order to test for differences between the Dickson, Lamer, and McLachlin Courts. Finally, the equation estimates the impact of particular litigants and intervenors, such as the Women's Legal Education Action Fund (LEAF), to determine whether their presence might sway the justices to vote in a particular manner. We included these five sets of variables in the regression models in Chapters 4, 5, and 6 whenever it made theoretical sense

to do so in order to explore the utility of the full-blown attitudinal model in the modern Canadian context.

As mentioned earlier, Chapter 2 presents an extensive theoretical discussion of why we believe attitudinal decision making may or may not be relevant in the Canadian context. Specifically, this chapter examines the various political, institutional, cultural, and legal forces that may foster or mitigate the appearance of attitudinal conflict in the post-*Charter* era. For example, we contend that the Canadian Court's enhanced power of judicial review, its increased volume of *Charter* cases, and its institutional independence all work to support the contention that Canadian justices are as likely to engage in attitudinal decision making as their US counterparts. We acknowledge, however, that other factors, such as the cultural and historical legacy of parliamentary supremacy, the institutional norm of collegiality, and recent criticism of activist rulings, to name a few, help suppress attitudinal decision making by the post-*Charter* justices. Even though we conclude that attitudinal behaviour is prominent in the modern Court, we argue that the countervailing forces at work in Canadian society help foster a more nuanced and less predictable pattern of attitudinal expression than is found in the US setting. The theoretical argument advanced in this chapter is critical because it suggests that attitudinal behaviour may be prominent within high courts but at the same time may be diminished by the unique institutional, political, and cultural structures found in different countries. Ultimately, we believe that the more muted attitudinal findings in the Canadian Court have profound implications for how the attitudinal model may perform in disparate cultural settings and for the development of a more global theory of judicial behaviour.

Chapter 3 focuses on constructing a measure of judicial ideology that a justice had before he or she was appointed to the Court in order to test the attitudinal model in the Canadian context and to provide a viable indicator of judicial liberalism for future research. Since Court nominees shy away from disclosing their beliefs in public discourse, and researchers therefore lack direct knowledge of a justice's ideological views before they join the Court, we provide a comprehensive discussion of the utility of applying four different indirect measures of liberalism in Canada that have been prominent in prior US research. We ultimately employ two of the four measures in subsequent chapters because they were not highly correlated with each other, they tap distinct latent dimensions of judicial ideology in the Canadian setting, and they hold the most promise for correlating with the ideological

voting patterns of the justices. The first measure is derived from the party of the appointing prime minister, while the second parallels Segal and Cover's indicator (1989), which is based on multiple newspaper accounts of a nominee's ideology at the time of his or her appointment. The inclusion of these two indicators in our subsequent statistical models highlights compelling distinctions between the prominence of both measures in the US context as opposed to our finding that only the newspaper indicator performs well across disparate issue areas in the post-*Charter* Canadian Court. In order to address possible criticisms that might be levelled at the newspaper ideology measure and advance our belief that it is the most viable a priori predictor of judicial liberalism in the Canadian setting, Chapter 3 presents multiple tests of internal and external validity to demonstrate its overarching power. We believe that this new ideological measure will have broad appeal for court watchers and researchers both within and outside of Canada, because of its potential use in future studies of the Canadian Court and its ability to be replicated in other advanced democratic societies.

Chapters 4, 5, and 6 present a three-pronged examination of attitudinal conflict and consensus that has emerged in the criminal, civil rights and liberties, and economic cases in the first twenty years under the *Charter.* Each chapter is divided into two main sections. The first is devoted to documenting the number of cases decided in an area of law, the percentage of the docket devoted to each issue, the frequency of non-unanimous rulings, patterns of ideological voting, case participation, opinion authorship, activism, and ideological voting stability. The second section addresses the applicability of the attitudinal model in two subfields of law: right to counsel and search and seizure disputes in Chapter 4, equality and free expression controversies in Chapter 5, and union and tax cases in Chapter 6.

The results in Chapter 4 indicate that panel sizes and rates of consensus in the Canadian Supreme Court in the criminal area parallel those that were found when examining the statistics for all cases in the 1984–2003 period. Thus, criminal disputes have not generated greater levels of ideological conflict than those found in all other areas of law. Moreover, when looking at opinion authorship patterns, Justices Lamer and Cory emerged as the task leaders of the post-*Charter* Court in criminal cases, authoring high rates of majority opinions, while Justices Beetz and Chouinard appeared content to follow the lead of others. Justices L'Heureux-Dubé and Deschamps, in turn, were clear outsiders, authoring the largest percentage of dissents despite their location on opposite ends of the ideological spectrum. In the criminal area,

unlike the other two fields studied, there is a clear connection between liberal voting patterns and rates of activism in the post-*Charter* Court, demonstrating a conservative reluctance to invalidate criminal law statutes. The results also indicate that in the criminal area, the justices exhibited relatively consistent ideological voting patterns over time. The data from the first section of Chapter 4 provide important evidence of the ideological voting tendencies of individual justices of the post-*Charter* Court in criminal cases. The results in the second section illustrate that the full-fledged attitudinal model does a remarkable job of explaining the voting patterns in prominent post-*Charter* criminal disputes. Most notably, they indicate that the newspaper ideology measure presented in Chapter 3, and not the party of the appointing prime minister, serves as a powerful predictor of attitudinal decision making in right to counsel and search and seizure cases. Its impact remains significant even when controlling for a host of rival explanatory variables. The prominence of ideology in these cases is crucial because the attitudes and values of nominees are often downplayed in the judicial appointment process in Canada. Our findings also reveal that a myriad of case facts act as cues for liberal and conservative votes by the justices, and that members of the Court at different ends of the ideological spectrum respond in distinctive manners to different case characteristics. This latter finding highlights a degree of attitudinal complexity that has emerged in the Canadian Supreme Court that distinguishes the justices' voting behaviour at the two ends of the ideological spectrum. Overall, the results in Chapter 4 indicate that pervasive liberal/conservative ideological conflicts have dominated the Court in these two criminal areas in the post-*Charter* period.

Chapter 5 highlights decision making in the civil rights and liberties area. The initial data suggest that these disputes foster greater rates of conflict than in criminal cases or collectively across all other categories of law. Chief Justices Dickson and Lamer stand out as leaders of the Court in these cases, authoring the largest percentage of majority opinions, while a handful of justices – Binnie, Estey, Gonthier, and Le Dain – can be considered as opinion followers in this area of law. Justices McLachlin and L'Heureux-Dubé, in turn, exhibited outsider activity with a large volume of dissenting opinions. Their distinctive voting behaviour, along with the patterns of the three other female justices in our study, confirm that women on the post-*Charter* Court have developed a feminist approach that is distinct from their male counterparts toward equality cases and the bulk of free expression claims in the first twenty years under the *Charter.* The substantial gender gap on the Canadian

high court in the civil rights and liberties area is remarkable, because it stands in stark contrast to the more mixed results with regard to gender differences in the US public law literature (see Songer and Crews-Meyer 2000). Moreover, these findings have great significance for prime ministers, members of Parliament, and court watchers who may be interested in the legal and political ramifications of naming female justices to the high court. In contrast to the criminal area, the data in Chapter 5 reveal that there is a weak association between judicial ideology and activist voting, which means that conservative justices are just as apt to hand down activist rulings as their liberal counterparts in civil rights and liberties disputes. Moreover, about half of the justices in the civil rights and liberties cases exhibited unstable ideological voting patterns over time, which differs from the relative stability found in the criminal area. Taken together, these data suggest that those who follow and study the Canadian Court, along with comparative law scholars, must be mindful that complex manifestations of ideological behaviour may emerge among the justices in different areas of law.

The second part of Chapter 5 further amplifies the critical role that gender differences play in judicial voting in discrimination and free expression cases. Put simply, the progressive stance taken by the female justices remains prominent even when controlling for a host of factors, including the ideological proclivities of the justices on the high court. Unlike the findings in Chapter 4, the two a priori indicators of ideology are not effective in predicting liberal and conservative votes in these two areas of law. This remarkable finding might shock scholars more familiar with the US Supreme Court, because most would think that civil rights and liberties cases would be the most likely to provoke ideological tensions on the court. Moreover, this result unmasks the flaw in thinking that attitudinal decision making will apply neatly and easily across national boundaries, and demonstrates the need for more systematic cross-cultural studies assessing the applicability of the attitudinal model, even in countries that share many of the same political and institutional features as the US.

The results in Chapter 6 indicate that panel participation rates in economic cases are roughly the same as in the criminal area and those found across most other cases. There were, however, higher rates of unanimity in economic disputes than in all other areas combined. In line with their business law acumen, Justices Iacobucci and Estey acted as the task leaders in economic cases, authoring far more majority opinions than the average, while Justice Stevenson stood out as the sole economic outsider during his brief

stay on the Court. Most of the justices serving in the 1984–2003 period appeared to cluster around the moderate middle of the Court when casting votes in economic cases. The connection between activism and liberalism in economic disputes is more mixed, and thus falls somewhere between the strong patterns found in the criminal cases and the virtually non-existent relationship in the civil rights and liberties area.

Our findings in the three areas of law have broad implications for the larger debate about judicial activism that is taking place in the Canadian literature. The disparate results suggest that the charge of liberal activism levelled by leading court critics must be tempered because conservatives are as likely as their liberal counterparts to engage in activist rulings in prominent civil rights and liberties and economic cases. The data charting ideological stability over time in the economic area suggest that while most of the justices are consistent, several have very unstable records over a six-year time period, a pattern similar to that found in the civil rights and liberties area. The instability across two of the three substantive areas suggests that legal practitioners and court observers need to be aware that some justices on the Court may indeed change their ideological stripes over the course of their tenure on the Court, which may have a profound impact on the direction the law takes over time. Moreover, our data suggest that comparative scholars need to be sensitive to the fact that changes in justices' voting behaviour over time may be more systematic on a court than one would expect given the contention by US scholars that political elites supposedly harbour clear and consistent ideological stances (see Campbell et al. 1960).

The second half of Chapter 6 echoes many of the themes set out in Chapter 4. As in the criminal area, the justices exhibited relatively clear patterns of ideological voting in both union and tax cases, and the party of prime minister measure did not perform well in any of the models. Moreover, factual scenarios in economic cases played a prominent role in shaping the disparate votes of the justices at different ends of the ideological spectrum, which parallels our findings in the criminal fields. It should be noted, however, that conservative justices in the economic cases tended to be more animated to follow their ideological proclivities than their liberal counterparts when responding to case facts. In our statistical models of the union cases, experience as a private attorney was highly correlated with the newspaper ideology measure, and thus, not surprisingly, served as a useful surrogate of judicial liberalism. In fact, it performed better as a predictor of liberal voting than our newspaper scores across all union cases as well as in non-unanimous

disputes. In the tax area, although the newspaper ideology measure was not statistically significant when examining all tax cases, it proved to be the most powerful predictor of voting behaviour in non-unanimous disputes. This finding matches our results for non-unanimous rulings in the two areas of criminal law discussed in Chapter 4. The disparate finding in the tax area for the impact of the newspaper ideology measure points to the significant role that factual circumstances can play in the minds of justices when assessing all cases, namely, that ideological considerations take a backseat to specific case facts, but when justices disagree, ideological tensions play a much stronger role in shaping their voting behaviour. The dynamic relationship between ideology and facts in the tax area, along with the fact that private practice served as a viable surrogate for liberalism in the union cases, collectively point to the complex impact of ideology on judicial voting in prominent economic cases. Having said this, the findings in Chapter 6 reinforce the conclusions from Chapter 4 that the attitudinal model is a prominent theoretical paradigm for explaining judicial decision making in four of the six areas of law studied in the post-*Charter* Canadian Court.

One important finding to be garnered from Chapters 5 and 6 is that intervenors had mixed success in their effort to influence the votes of Supreme Court justices. While the appearance of the Women's Legal Education Action Fund (LEAF) had a dramatic, positive effect for rights claimants in equality cases, the presence of the Canadian Civil Liberties Association (CCLA) had a negligible impact on the Court in free speech cases. As mentioned in Chapter 5, one reason why the CCLA has had such a negligible impact may be its tendency to intervene in the most difficult free speech cases. In contrast, the appearance of the Canadian Labour Congress (CLC) in union/management disputes did have a significant, pro-union impact on judicial votes across all cases. When blue collar and public safety workers were litigants in union disputes, the justices also cast more votes in their favour. Our mixed findings in this area suggest that Canadian scholars might want to explore in greater detail why certain types of intervenors have a greater influence on judicial votes than others (for exceptions, see Brodie 2002; Manfredi 2004). Comparative scholars might also want to focus more attention on the political success of various interest groups in other high courts to see whether there are any consistent cross-national patterns.

Chapter 7 integrates the results found in the substantive chapters by examining the extent to which individual justices maintain ideologically consistent voting patterns across the three distinct areas of law. This chapter

borrows from the ideological framework championed by Janda et al. (2004), which examines the inherent tensions found in all democracies between the competing values of freedom, order, and equality. We present four different scatterplots that assess how Canadian justices have balanced these competing values across economic, criminal, and civil rights and liberties cases (for a similar approach, see Morton et al. 1994). We use this analysis to identify the ideological labels that best fit the justices of the post-*Charter* Court, and to catalog their ideological consistency across different issue areas. Ultimately, eleven justices display ideologically consistent voting records, with Justices Arbour and Wilson falling into the liberal quadrant while Justices Beetz, Gonthier, La Forest, Lamer, and McIntyre are quintessential conservatives. In contrast, Justices Cory, Dickson, and L'Heureux-Dubé earn the communitarian label, while Justice Iacobucci straddles the conservative-communitarian divide. Our findings reveal that the six remaining justices exhibited ideologically inconsistent voting patterns, and five of them happen to be members of the McLachlin Court. Among this group, Justices McLachlin, Bastarache, and Binnie took a pro-government stance in the criminal area and a pro-litigant stance in civil liberties cases, while Justice Sopinka did the exact opposite.[1] Overall, most but not all justices took issue stances, whether from an extreme or moderate position, that validate the contention that most political elites possess ideologically consistent beliefs across different issue domains. Our findings also show remarkable patterns of ideological consistency in the aggregate rulings of the Dickson, Lamer, and McLachlin Courts when various issue areas are examined, with the exception of the McLachlin Court's libertarian swing in civil liberties disputes. Collectively, the consistency found in these two sets of data reinforce the legitimacy of the attitudinal model for explaining decision making in the first twenty years of the post-*Charter* Court.

In the final chapter, we summarize the major findings of the book and discuss their implications for court watchers, political scientists, politicians, journalists, and legal scholars both within and outside of Canada. For instance, we explore the importance of the chief justice's ability to structure panel compositions in the Canadian setting, and the potential for ideological considerations to filter into that institutional process. We discuss the different leadership styles of the post-*Charter* chief justices and examine how legal specialization, opinion leadership, and outsider activity emerge in a court that is largely collegial in its work style. In addition, we link our empirical findings about judicial activism to the broader debate about the Court's proper role in a Canadian system that is rooted in parliamentary supremacy.

We also discuss the implications of our ideological findings for Supreme Court nominations and the possible politicization that could emerge with the institution of different types of parliamentary oversight procedures. We explore the linkages between attitudinal decision making and the rise of interest group activity in the Canadian courts in recent decades. We also discuss the impact that female justices have on rulings in the realm of equality law, and suggest that prime ministers should be aware of the significance of gender when considering future Supreme Court appointments. We speculate on the practical implications that our findings regarding case facts might have for the strategic choices that lawyers, litigants, and intervenors might make on whether to pursue an appeal to the Supreme Court. The discussion of these and other implications demonstrates that this book might have broad appeal to politicians and the general public, as well as public law scholars interested in the architecture of a more global theory of attitudinal decision making for a multitude of democratic high courts.

The data from our study identify some important overarching conclusions that scholars should take away from this work. First, a consistent theme throughout the book is that while ideology has significant prominence in the post-*Charter* Court, its impact is far less definitive than that found in the US Supreme Court, where rote ideological decision making has flourished. Evidence of this complexity is provided by the absence of ideology as an important explanatory variable for the votes of Canadian justices in the free expression and equality results presented in Chapter 5. The fact that ideology plays a more nuanced role in the Canadian context is largely attributable to the fact that the two courts operate in different cultural, institutional, and political environments. One should note that the more subtle impact of ideology is amplified by the different voting and writing patterns that individual justices register in different sets of cases. For instance, our data demonstrate that individual justices may serve as an ideologically moderate opinion leader in one area of law but a more conservative outsider in another, depending on the policy issue that the Court addresses. Thus, one of the significant features of this study is that not only is ideological voting more muted in the Canadian setting but some of the individual justices engage in distinctive patterns of ideological behaviour across different areas of law.

A second important theme to be drawn from this book, especially for Canadians concerned about the political nature of judicial activism, is that outside the criminal area, judicial activism does not fall along liberal/conservative lines. In other words, in most areas of law, the judicial act of

nullifying statutes is no more a province of liberal justices than of their conservative counterparts. A third prominent theme is that case characteristics do influence voting behaviour on the Canadian high court, and that critical distinctions emerge regarding the types of facts that are important to the justices at opposite ends of the ideological spectrum. A fourth theme is that gender differences do structure the distinctive voting patterns of male and female justices in a host of equality circumstances and non-unanimous free speech cases.

Overall, we believe that these overarching themes demonstrate that our book makes a significant contribution to the literature. Our research not only stands on the shoulders of previous attitudinal scholars by examining the model in a systematic way across multiple issue areas in a new court setting but also lends credence to the possible development of an overarching paradigm for explaining judicial conflict in democratic high courts around the world. The study also presents an account of judicial behaviour that is distinct from the overt ideological patterns prevailing in the US Supreme Court. At the end of the day, in response to Justice Iacobucci's query regarding what drives conflict on the contemporary Canadian Court, we would have to assert that although ideological differences do help explain divisions that emerge on the bench, the discord is less transparent and more varied than attitudinal theorists might have expected.