Osgoode Hall Law Journal

Volume 47, Number 3 (Fall 2009)

Article 8

Book Review: The Transformation of the Supreme Court Of Canada: An Empirical Examination, by Donald R. Songer

Daved Muttart

Book Review

THE TRANSFORMATION OF THE SUPREME COURT OF CANADA: AN EMPIRICAL EXAMINATION, by Donald R. Songer[1]

DAVED MUTTART[2]

THE TRANSFORMATION OF THE SUPREME COURT OF CANADA: AN EMPIRICAL EXAMINATION (*Transformation*) provides two new and important additions to our knowledge of the Supreme Court of Canada. First, the book describes extensive interviews conducted with the justices of the Supreme Court by the author. Second, the work explores the extent to which the Court's decision making is legally and judicially based, as opposed to being policy or politically based. *Transformation*'s claim to be an empirical examination rests upon analyses of the interviews, as well as reliance on statistical data.

The Supreme Court of Canada, in particular, has several characteristics that make it an excellent example for, and analysis of, high courts around the world. Unlike its American counterpart, which has a constitutionally limited jurisdiction, it has a plenary jurisdiction. Canada's Court has had at least two female justices serving on the bench since 1987, and it currently has four female members. The highest courts in other Anglo-American jurisdictions have only ever had one woman serving the bench at any given time.[3] Further, the Supreme Court of Canada displays many tendencies in its rulings, which judicially situates it midway between the United States Supreme Court and the House of Lords in the United Kingdom. For example, the Canadian Court has demonstrated more of a willingness than the House of Lords to overturn its own prior deci-

---

1. (Toronto: University of Toronto Press, 2008) 290 pages.
2. Ph.D., Sessional Instructor, Faculty of Criminology, Justice and Policy Studies, University of Ontario Institute of Technology.
3. Daved M. Muttart, "A Content Analysis of Supreme Court of Canada Judgements: Preliminary Observations" (SSRN Working Paper Series, September 2009), online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1470703>.

sions, but it is typically less willing to do so than the US Supreme Court. Additionally, as with other courts, its proper role within the legal system is constantly debated.

As an American, and thus an "outsider" to Canadian law, Donald Songer avoids doctrinal issues, and instead concentrates on comparing quantitative data from several judicial eras. In most instances, Songer compares and contrasts the Court's behaviour in five time periods: 1970-1975, before it obtained control of its docket; 1976-1983, when the Court controlled its docket, but did not make any rulings based on the *Charter of Rights and Freedoms*; 1984-1990, the initial *Charter* period; and two later *Charter* periods, 1991-1999 and 2000-2003.[4] Songer incorporates his statistics, interview data, and the work of a selection of authors into a lucid analysis of how the justices are selected, and why and how they reach their decisions.

Songer begins, in chapter one, by contrasting a Court that was largely ignored in the early 1970s to one that now generates extensive media coverage and political debate. The Supreme Court's transformation from obscurity to the pinnacle of power as the interpreter of the *Charter* means that the Court now has both legal and political roles.

In chapter two, Songer elaborates on his argument that the Canadian high court is more democratic than final courts in other jurisdictions, due to the diversity of the backgrounds of its justices. He notes that the Canadian Constitution's geographical requirements effectively demand the appointment of Catholics, Protestants, Francophones, and Anglophones.[5] Justices, including those now serving, have been appointed by both Liberal and Conservative prime ministers. Songer also traces the evolution of a once completely male bench to one that now boasts four women. In addition, the Court now has members representing a variety of faiths. Songer mentions, however, that many justices had no prior judicial experience before being elevated to the Court. While Songer is correct in noting that the background of the Court's justices has become more diverse, especially in respect to gender, in labelling this trend "democratic," he fails to come to grips with the fact that all of the justices are white, upper-middle class, and, perhaps most importantly, one-time lawyers.

---

4. Some issues are tracked on an annual basis, while others are matched with the terms of the Court's Chief Justices.

5. *Songer, supra* note 1 at 26-42.

Chapter three begins by describing the Court's control of its docket—almost all cases today require the Court's leave before they will be heard.[6] In discussing which issues receive this leave, Songer quotes the justices as concluding that "national importance is the key [criterion as to whether leave is granted]." The Court is not interested in error correction, but rather in issues of legal significance. Songer then traces three major trends in the Court's docket: firstly, and especially since the advent of the *Charter*, the Court has heard more criminal cases as compared to those involving private economic disputes; secondly, the number of statutory interpretation cases dipped below those involving constitutional issues in the wake of the *Charter*, but have now rebounded; and, thirdly, the number of cases involving judicial review in general, as opposed to those involving only the review of statutes, rose after the *Charter* was enacted.

Songer next turns his attention toward the various players in the judicial system, and, specifically, who wins and who loses. He finds that corporations are just as likely to be the appellant as they are to be the respondent, while individuals are more likely to be the appellant.[7] The provincial level of government appears most often in front of the Supreme Court of Canada, but, as a function of population, Ontario is underrepresented before the Court, while British Columbia is overrepresented.[8] Individuals have the lowest success rate (41 per cent), while the provincial and federal governments have the highest (62 per cent); however, the party-capability theory, which predicts a higher success rate for litigants who possess greater resources, is contradicted by the success rate of individuals over businesses.[9]

In chapter five, *Transformation* moves towards a discussion of the Court's decision-making process. There has been a trend towards more appeals being heard by all nine justices, and, in all time periods, the number of justices hearing a case increased with the importance of the issues involved. Additionally, the author finds that non-party intervenors are playing an increasing role.[10] The mechanics of the justices' preparation, hearing, consensus-building, and opinion writing are discussed with an informative blending of previous commentary with Songer's own interview data. While there does not appear to be a clear rule for

6. Some criminal cases continue to come before the Court as of right.

7. Songer, *supra* note 1 at 83.

8. *Ibid.* at 85.

9. *Ibid.* at 93.

10. *Ibid.* at 123-26.

determining who will author the opinion of the Court, seniority, expertise, individual interest, present workload, and the Chief Justice's vague perception of who can best unite the bench are governing factors.[11] Some justices have their clerks draft the initial opinion, while others write the first draft and then request critique from their clerks. The draft majority opinion is then circulated to the other justices for comment. Negotiation often ensues as to the basis for the opinion, and these discussions sometimes lead to redrafting with a view to broaden support.

Transformation is at its strongest when it analyzes the extent to which the Court's decision making is legal or judicial and the extent to which it is changing. In chapters six through eight, extant attitudinal studies, which propose that justices make rulings based on their personal opinions as opposed to the law, are efficaciously interwoven with the information gathered from Songer's interviews. This results in an analysis that cogently supports Songer's thesis that, while the Canadian justices' attitudes are important to their decision-making process, most of their efforts are spent analyzing legal issues as opposed to policy-based materials.

Songer's thesis is supported by his examination of the justices' collegial approach to the decision-making process, with an emphasis on compromise and unanimity in forming opinions. While there is, on occasion, bargaining among the judges regarding an opinion, in an attempt to obtain wider support for the ruling, there did not appear in Songer's study to be any trading of votes from case to case.[12] However, the fact that the attitudes and background characteristics of the justices—including the gender and political party that appointed the justice in question—appear to be correlated to the directionality of their decisions shows that factors other than an objective legal analysis also play a role in the outcomes reached by the Court.[13] Given this information, though, the role that the justices' attitudes play in the Court's decision-making process is small, and substantially controlled by the political moderation of the judicial system and the justices' strong respect for the rule of law.

There were several specific conclusions reached by the author. Firstly, the interviews disclose that the justices strive for consistency in their rulings across the provinces.[14] Secondly, while the Court has been moderately conservative

11. *Ibid.* at 129.
12. *Ibid.* at 216-17, 235-36.
13. *Ibid.* at 223-28, 235.
14. *Ibid.* at 156.

overall and particularly in criminal law matters, it has been more liberal in decisions dealing with civil liberties, public law, and torts. Thirdly, the advent of the *Charter* led to more liberal decisions in the criminal sphere and increased the Court's progressive tendencies in the civil liberties cases. Fourthly, when the *Charter* was first enacted, rights claimants had a high rate of success (66 per cent), but their success rate has declined in recent years (40 per cent).[15] Lastly, there is a high proportion of unanimous decisions handed down by the Supreme Court of Canada (approximately 70%), especially when compared to the US Supreme Court (approximately 35%).[16]

CONTRIBUTIONS TO KNOWLEDGE: INTERVIEWS AND SYNTHESIS

The most important additions to our knowledge of the Supreme Court of Canada are the interviews conducted with the Court's justices. Songer inserts the interviews throughout his narrative, effectively peering inside the leave-to-appeal decision-making processes of the Court, as well as the collegiality-enhancing practices of the justices. The questions posed to the Justices are included in the Appendix; however, the transcripts of the interviews are not included. Portions of the interviews are summarized throughout the text, as the justices' responses become relevant to the points that Songer seeks to make.

In two sections, Songer tackles Charles Epp's contention that the *Charter*'s influence on the Court's jurisprudence "is overrated."[17] Songer begins by contrasting Epp's opinion with those of other scholars and then moves on to criticize Epp's methodological choice of measuring trends by examining the Court's decisions every five years. Songer expanded his quantitative analysis to include holdings from every year. His larger sample allows him to conclude that there was a substantial increase in the percentage of civil rights cases on the Court's docket after the enactment of the *Charter*.[18] Furthermore, the success rate for those seeking a civil rights remedy increased post-*Charter*.[19]

Notwithstanding that Songer's text contains several important contributions to legal scholarship, *Transformation* contains several notable gaps. Although it

15. *Ibid.* at 161-72.

16. *Ibid.* at 210-13.

17. *Ibid.* at 70-76, 166-72. However, Songer makes no reference to Harry Arthurs & Brent Arnold, "Does the *Charter* Matter?" (2005) 11 Rev. Const. Stud. 37.

18. *Songer, ibid.* at 164-65.

19. *Ibid.* at 168.

bears a 2008 publishing date, most of the research pre-dates 2004.[20] Where later texts are referred to, including Ostberg and Wetstein's highly relevant 2007 book on attitudinal decision-making,[21] the reference is cursory at best, and the findings are not incorporated into the author's analysis.[22] Songer's conclusion[23] that the justices are unwilling to use section 7 of the *Charter* to depart from the status quo is radically at odds with the Court's 2005 decision in *Chaoulli*, which utilized section 7 to remove prohibitions on private health care.[24]

The most striking omission for a largely empirical text is the lack of reference to a series of articles that measured the extent to which the Court strikes down legislation for contravening the *Charter*. In 2003, Choudhry and Hunter concluded that the rate at which legislation was being struck down by the Court was neither increasing nor decreasing over time, and that the Court's rulings under section 1 of the *Charter* did not show any consistent pattern over time.[25] Their 2003 piece was an update of articles by several eminent authors published in 1992 and 1999.[26] This statistical analysis is directly relevant to Songer's discussion on the extent to which legislation was, or was not, struck down.[27]

---

20. For example, Songer entirely omits reference to my text, which is published by Songer's own publisher. See Daved Muttart, *The Empirical Gap in Jurisprudence: A Comprehensive Study of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2007).
21. Cynthia L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007).
22. *Songer, supra* note 1 at 194.
23. *Ibid.* at 171.
24. *Chaoulli v. Quebec*, [2005] 1 S.C.R. 791. Only four of the five justices in the majority used section 7, but the door is now certainly wide open to further expansive use of section 7.
25. Sujit Choudhry & Claire E. Hunter, "Measuring Judicial Activism on the Supreme Court of Canada: A Comment on *Newfoundland (Treasury Board) v NAPE*" (2003) 48 McGill L.J. 525. See also Daved Muttart, "Dodging The Issue: Activism in the Supreme Court of Canada" (2005) 54 U.N.B.L.J. 101 (where the first finding was confirmed, but the second one was contradicted).
26. F.L. Morton, Peter H. Russell & Michael J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1; James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 Osgoode Hall L.J. 625. Songer does briefly quote the 1992 article—misspelling the name of one of the authors—but goes no further. See *Songer, supra* note 1 at 161. These articles also demonstrate that the Court does not deal differentially with issues covered by the section 33 notwithstanding clause, a point that is not discussed in *Transformation*.
27. *Songer, ibid.* at 159-72.

Songer is also uneven in his treatment of other relevant scholarship. He cites H.L.A. Hart's legal positivism but does not mention Ronald Dworkin's contrary analysis. He quotes Michael Mandel's legalization hypothesis, while omitting Allan Hutchinson's rebuttal.[28] The Court's insistence on the accused person's right to a trial within a reasonable timeframe in *R. v. Askov* (1990) is cited, but not its speedy retreat in *R. v. Morin* (1992).[29] Songer fails to mention published accounts by the justices themselves of the decision-making process in the Court.[30]

While *Transformation* provides some comparison between the Canadian and American Supreme Courts,[31] I would have appreciated a more in-depth comparison, given that Songer is American. The discussion of attitudinal decision-making studies in Canada and the United States[32] is a welcome exception, but, even here, the description of the situation in the United States tends to be general: there are no charts of pro-accused, pro-underdog, or pro-government rulings by American justices to match those of their Canadian counterparts. Comparisons with other courts of last resort are even more cursory.

Transformation would perhaps, therefore, have been strengthened by collaboration with a Canadian author. For example, the rise in the proportion of criminal and civil rights appeals[33] was influenced by resources available through legal aid and other court-funding programs. A Canadian author would presumably have encouraged Songer to take this issue into account.

Lastly, Songer's discussion as to the methodology that he employed is often cursory. For example, there is a lack of justification as to how cases were chosen or coded.[34] Such descriptions are essential for scientific replication. Also, it is

---

28. Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995).

29. *R. v. Askov*, [1990] 2 S.C.R. 1199; *R. v. Morin*, [1992] 1 S.C.R. 771. See *Songer*, *supra* note 1 at 144.

30. See *e.g.* Ian Binnie, "A Survivor's Guide to Advocacy in the Supreme Court of Canada" (1999) 18 Advocates Soc. J. 13; Beverley M. McLachlin, "The *Charter*: A New Role for the Judiciary" (1991) 29 Alta L. Rev. 540; John Sopinka, "Must a Judge be a Monk—Revisited" (1996) 45 U.N.B.L.J. 167; Michel Bastarache, "The Role of Academics and Legal Theory in Judicial Decision-Making" (1999) 37 Alta L. Rev. 739; and John C. Major, "Unconscious Parallelism: Constitutional Law in Canada and the United States" (2005) 19 Wash U.J.L. & Pol'y 139.

31. See *e.g. Songer*, *supra* note 1 at 56, 69-70.

32. *Ibid.* at 173-94.

33. *Ibid.* at 60, 70.

34. *Ibid.* at 67. The discussion of winners and losers is a happy exception (at 90ff).

often unclear whether the author is relying on previous sources or his interviews when discussing the Court's practices or decision-making processes.[35]

In summary, *Transformation* has several gaps in its argument. However, the interviews granted by the justices are interesting and illuminating, and unlikely to be found elsewhere. The analysis of the extent to which the Court's rulings are judicial, as opposed to political, is lucid, coherent, and enlightening.

35. See *e.g. ibid.* at 121, 132-33.