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Benjamin Alarie

Andrew Green



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# Charter Decisions in the McLachlin Era: Consensus and Ideology at the Supreme Court of Canada

**Benjamin Alarie**[*] **and Andrew Green**[**]

## I. INTRODUCTION

Recent empirical studies of decisions by the Supreme Court of Canada have found that the justices appear to lack the overtly ideological voting patterns of justices on the United States Supreme Court.[1] However, voting patterns may change both across areas of law and over time. If justices do vote according to their own policy preferences or ideology in at least some appeals, Charter[2] appeals would seem to be a fruitful area to search for such voting. Justices may vote in particular ways for reasons other than ideology, including a desire to exhibit consensus on an issue. A court may have different norms about consensus and these norms may also vary according to areas of law and across time. A norm of consensus in Charter appeals would, for example, mitigate a desire on the part of justices to vote according to their particular policy preferences. This article examines Charter judgments issued by the Supreme Court of Canada from the beginning of Chief Justice McLachlin's leadership of the Court in January 2000 to the end of

[*] Assistant Professor, Faculty of Law, University of Toronto.

[**] Assistant Professor, Faculty of Law and School of Public Policy and Governance, University of Toronto.

[1] See Benjamin Alarie & Andrew Green, "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada" (2007) 57 U.T.L.J. 195; Benjamin Alarie & Andrew Green, "Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada" (2008) 58 U.N.B.L.J. 74 [hereinafter "Alarie & Green, 'Should They All Just Get Along?'"]; Benjamin Alarie & Andrew Green, "Policy Preference Change and Appointments to the Supreme Court of Canada" (2009) 47 Osgoode Hall L.J. 1 [hereinafter "Alarie & Green, 'Policy Preference Change'"]; and Claire L. Ostberg & Matthew E. Wetstein, *Attitudinal Decision-Making in the Supreme Court of Canada* (Vancouver: University of British Columbia Press, 2007) [hereinafter "Ostberg & Wetstein"].

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

March 2009. It seeks to identify the role of ideology and consensus in the decisions of the Court and to discuss the implications.

The literature on ideological or attitudinal voting is particularly well developed in studies of the U.S. Supreme Court.[3] These and related studies have found that American appellate justices, and particularly those on the U.S. Supreme Court, tend to vote in particular ways that seem to have a political valence. These studies generally group justices by certain indicators of ideological preference such as the party of the appointing president or how the justices were viewed ideologically at the time of appointment. For example, justices appointed by Democratic presidents tend to vote similarly to other justices nominated by Democratic presidents and these justices generally vote in a more "liberal" manner than Republican-nominated justices. These differences are most stark in appeals involving civil rights and freedoms. Nevertheless, despite this tendency to vote in accordance with policy preferences, the U.S. Supreme Court renders unanimous decisions in approximately 40 per cent of the appeals it hears.[4]

The Supreme Court of Canada has tended to exhibit a different pattern. Although there is a connection between how justices vote and *ex ante* indicators of policy preferences, such as the party of the appointing Prime Minister or views of the justices in newspaper editorials at the time of appointment, this connection is weaker than in the U.S. Moreover, in Canada, this connection appears in the past to have been, if anything, even weaker in Charter appeals than in other types of appeals.[5] Further, there tends to be a greater norm of consensus on the Supreme Court in Canada than in the U.S., with the Supreme Court of Canada rendering unanimous decisions in about 60 per cent of the appeals it hears; this is half again as frequently as at the U.S. Supreme Court, which does so at a rate of about 40 per cent.

However, voting tendencies do appear to change over time. These changes could be the result of a difference in the mix of appeals which

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[3] See Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2002) [hereinafter "Segal & Spaeth"]; Cass R. Sunstein, David Schkade, Lisa M. Ellman & Andres Sawicki, *Are Judges Political? An Empirical Analysis of the Federal Judiciary* (Washington D.C.: Brookings Institution Press, 2006) [hereinafter "Sunstein *et al.*"]; and Andrew D. Martin, Kevin M. Quinn, Theodore W. Ruger & Pauline T. Kim, "Competing Approaches to Predicting Supreme Court Decisionmaking" (2004) 2 Perspectives on Politics 761 [hereinafter "Martin *et al.*"].

[4] See, *e.g.*, Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, D.C.: CQ Press, 1998), at 41 [hereinafter "Epstein & Knight"].

[5] See Ostberg & Wetstein, *supra*, note 1; and Alarie & Green, "Policy Preference Change", *supra*, note 1.

come before the Court — that is, the voting preferences of the justices may remain the same over time but they may appear to vote in a more "liberal" or "conservative" direction because the nature of the appeals they hear has changed over time. Alternatively, the justices of the Court may alter their voting behaviour as the composition of the Court and the identity of colleagues change. For example, the substantive content of the appeals may remain the same over time but the particular composition of the Court may change as a justice leaves and another joins. The effect of these leavers and joiners may be either direct, as where the addition of a more conservative (liberal) justice changes the balance of voting on the Court in a more conservative (liberal) direction, or more indirect, where justices actually change their votes in the presence of justices more or less aligned with their own views.[6]

In this article, we examine how justices on the Supreme Court of Canada voted in Charter appeals between 2000 and 2009.[7] We choose to focus on Charter appeals as they have, at least in popular belief and possibly too in theory (on account of the relative newness of the issues in this area of the law),[8] the potential to exhibit greater divergence in voting by judicial policy preferences. We attempt to assess whether there has been a tendency to ideological voting over this period. Moreover, this period covers the leadership of Chief Justice McLachlin. If there is a norm of consensus on a Court, it would seem likely that it at least in part is determined by the Chief Justice. Confining the analysis to this period therefore aids us in assessing the roles of ideology and consensus.

Part II of this article sets out the theoretical framework for the analysis. It discusses the literature surrounding the voting behaviour of justices, including the three most prevalent general models of judicial decision-making: the attitudinal, strategic and legal models. It also discusses the role consensus may play in judicial decisions. Part III describes our data and the result of the analysis. It sets out the general trends in the Court's Charter decisions in this period, including the number of Charter appeals, the identity of the winning parties and the degree of unanimity. It then analyzes how individual justices voted in

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[6] See Sunstein *et al.*, *supra*, note 3, who discuss the role of panel composition on decision-making in U.S. federal appellate courts.

[7] More specifically, our data includes 105 Charter appeals decided from January 2000 to the end of March 2009. A full list of the appeals is set out in Appendix A.

[8] See Peter McCormick, "Blocs, Swarms and Outliers: Conceptualizing Disagreement on the Modern Supreme Court of Canada" (2004) 42 Osgoode Hall L.J. 99 [hereinafter "McCormick, 'Blocs'"], discussing the impact of the Charter on levels of disagreement within the Court.

these appeals. Part IV ties the results of the analysis of Part III into the more general discussion of how justices have voted on the Supreme Court of Canada and the implications of these voting patterns.

## II. WHY DO JUSTICES VOTE AS THEY DO?

### 1. Ideology and Cooperation

A considerable body of empirical literature has developed to try to explain why justices vote as they do. Three principal models have been developed, each admittedly insufficient on its own terms. First, the attitudinal model assumes that justices vote in large part based on their policy preferences. If, for example, a justice tends to have "liberal" policy views, he or she may more readily find in favour of an outcome of an appeal encompassing a more expansive view of equality rights.[9] Second, the "strategic" model assumes that justices do not "sincerely" or directly vote for their preferred policy outcome in each appeal, but instead they take into account how their votes in the particular appeal will affect and be affected by other factors such as other justices on the court and other institutions, such as the legislature.[10] Finally, the "legal" model assumes that justices vote in accordance with legal principles and norms of statutory interpretation and precedent. In the case of ambiguity, justices attempt to interpret the statute in the manner most consistent with the aims of the statute or law as a whole.

In this paper we examine two important dimensions of these models for judicial decision-making. The first dimension relates to the degree to which ideological views or policy preferences influence justices' decisions. This influence could arise consciously (where justices directly consider and vote in accordance with their ideological views) or unconsciously (where the views act indirectly on justices' votes, such as through unconsidered assumptions).[11] At one extreme of this dimension,

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[9] For a discussion of several models of judging, see Segal & Spaeth, *supra*, note 3.

[10] See, *e.g.*, Epstein & Knight, *supra*, note 4, arguing justices should be viewed as voting strategically; Thomas H. Hammond, Chris W. Bonneau & Reginald S. Sheehan, *Strategic Behaviour and Policy Choice on the U.S. Supreme Court* (Stanford: Stanford University Press, 2005), presenting a formal model of strategic decision-making by judges; Forrest Maltzman, James F. Spriggs II & Paul J. Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge, UK: Cambridge University Press, 2000) [hereinafter "Maltzman, Spriggs & Wahlbeck"]; and Segal & Spaeth, *id*.

[11] See Eric A. Posner, "Does Political Bias in the Judiciary Matter?: Implications of Judicial Bias Studies for Legal and Constitutional Reform" (Spring 2008) 75 U. Chi. L. Rev. 853 [hereinafter

the justices of a court would be described as being ideologically "committed" or "interested". At the other end of the spectrum, justices of a court would be described as being ideologically "disinterested" or "uncommitted". Of course, it will sometimes and perhaps even usually be that the justices of the court vary significantly in the strength and nature of their ideological commitments.[12]

The second dimension along which courts vary is the collegiality or cooperativeness of the decision-making process in which the justices engage. Such cooperation is an element of the strategic model. At one end of this dimension will be courts in which there is little or no give-and-take, where justices attempt to independently determine the appropriate result in each appeal. These courts could be described as "uncooperative", with each justice providing, in some sense, an "independent draw" as to the merits of the appeal. The term "uncooperative" is not necessarily intended to be pejorative; some justices may consider and reasonably value independence as the best means of ensuring sustained, internally consistent reasoned judgment by each justice. This lack of cooperation could be negative, on the other hand, if personal or ideological differences limit effective cooperation. One would expect such a court to regularly issue plurality opinions.

At the other end of this spectrum, courts could be described as being "cooperative". Justices on these courts may engage in more collegial, deliberative decision-making. They may also value speaking when possible in a united voice because, for example, they value clarifying the law and consolidating the possibly differing approaches taken to discrete legal issues by lower courts.[13] There is also a possible negative side to the "cooperative" end of the spectrum if the apparent agreement arises not from deliberation but from justices trading off votes across appeals or areas of law in a judicial version of legislative logrolling.

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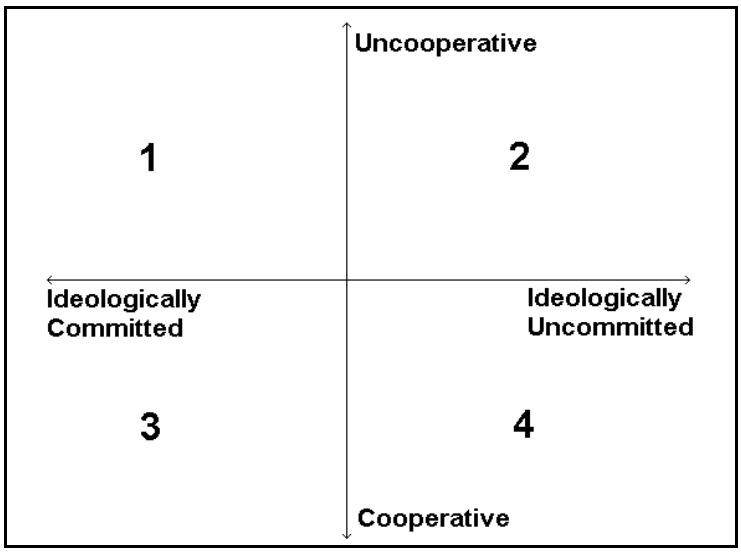
"Posner"], distinguishing between judges who allow their political biases to impact their decisions and those who do not, as well as between explicit or implicit bias.

[12] The discussion in this section is based on Alarie & Green, "Should They All Just Get Along?", *supra*, note 1.

[13] Some courts, including the Supreme Court of Canada, have a practice of from time to time issuing *per curiam* judgments that are not identified as having been authored by any particular justice. The Supreme Court of Canada has done this a number of times, including *Quebec (Attorney General) v. Blaikie (No. 1)*, [1981] S.C.J. No. 30, [1979] 2 S.C.R. 1016 (S.C.C.); *Reference re Secession of Quebec*, [1998] S.C.J. No. 61, [1998] 2 S.C.R. 217 (S.C.C.); and *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.). Since January 2000 the Supreme Court of Canada has done this on nine occasions in Charter appeals; see Appendix A for a list of these nine *inter alia* judgments.

**Figure 1: Quadrant Framework for Analyzing the Decision-Making Processes of Multi-Member Courts**




Recognizing that courts could vary along these two dimensions, the degree of ideological commitment and the degree of cooperativeness, suggests a four-quadrant framework for analyzing the decision-making processes of multi-member courts or panels. Courts in quadrant one are ideologically committed and uncooperative. Quadrant two courts are ideologically uncommitted and uncooperative. Quadrant three courts are ideologically committed and cooperative. Finally, quadrant four courts are ideologically uncommitted and cooperative. The following descriptions attempt to define the extremes in each quadrant (*i.e.*, the corners), although any particular court at any particular time almost certainly lies inside these extremes.

*(a) Quadrant One: Ideologically Committed and Uncooperative*

This first quadrant is associated with the attitudinal model of judicial decision-making, in which justices are assumed to decide appeals principally in a way that satisfies their own policy preferences without regard to the strategic possibilities that might arise by cooperating with

other justices in the resolution of any given appeal.[14] Courts situated in quadrant one, that is, courts whose justices are ideologically committed and uncooperative, will tend to issue a multiplicity of concurring opinions with an overall higher rate of dissents than the courts in other quadrants, all else the same. The number of opinions and the rate of dissent will be higher because the lack of cooperation means that individual justices will place little or no independent value on joining an opinion authored by a colleague. A justice will sign on to another's opinion only where she has a high degree of ideological consonance with the other justice in the particular appeal. If there is disagreement, a justice will prefer to author her own opinion rather than try, likely fruitlessly, to persuade her colleague to modify the reasons given for a certain outcome.[15] There will also be a tendency towards a proliferation of opinions in the presence of certain pre-existing ideological commitments. Justices, or at least coalitions of ideologically similar justices, will less frequently agree on the merits of a particular decision and the reasons justifying that decision than in circumstances in which justices lack these ideological commitments. This second reason relates to the stickiness of justices to a certain position they have reached on an appeal and would influence both the level of agreement and the predictability of groupings of justices.

### *(b) Quadrant Two: Ideologically Uncommitted and Uncooperative*

As with quadrant one, justices on quadrant two courts will place little or no value on agreeing for agreement's sake, but each justice will engage in a determined exercise to evaluate the appeal on its legal merits rather than on the basis of personal policy preferences. The second

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[14] The attitudinal model of decision-making has for decades been popular among political scientists and is probably the most well-known and most frequently deployed model in the political science literature. See, the sources cited *supra*, note 3, as well as David W. Rohde & Harold J. Spaeth, *Supreme Court Decision-Making* (San Francisco: W.H. Freeman, 1976), at 134-57; Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge: Cambridge University Press, 1993); and Frank B. Cross, "Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance" (1997) 92 Northwestern U. L. Rev. 251, at 265-79.

[15] This increase in the number of opinions holds all else constant such as, for example, workload. Justices may consider whether the (ideological) benefits of writing a separate decision is greater than the opportunity cost (due to the time cost of writing a decision), which may increase as the workload increases. For example, for the implications of workload in the context of decisions of Chief Justices of different courts, see Tracey George & Albert Yoon, "Chief Justices: The Limits of Attitudinal Theory and the Possible Paradox of Managerial Judging" (2008) 61:1 Vand. L. Rev. 1, a discussion of the impact of workload on judicial decision-making.

quadrant is associated with what legal theorists might call legal positivism and formalism — the idea that each appeal has a most valid or most defensible legal outcome, and that an ideologically uncommitted justice will strive to uncover the true legal merits of each appeal and decide on that basis. Justices of a quadrant two court may regard cooperation as suspicious, because it would suggest the possibility that a justice is open to compromising his or her own view of the underlying legal merits of an appeal in order to achieve some non-legal or policy goal. On such courts, suspicion and distrust of cooperation would influence the rate of dissenting or concurring opinions. However, because the legal authorities relevant to each appeal would be common to each justice, there would likely be less room for difference on ideologically uncommitted and uncooperative courts (quadrant two) than ideologically committed and uncooperative courts (quadrant one).[16] Provided that the range of ideologies of justices on quadrant one courts is broader than the likely range of ideologically uncommitted independent opinions of legal merit, a quadrant two court will tend to exhibit higher levels of agreement than quadrant one courts and less predictable groupings of justices.

### *(c) Quadrant Three: Ideologically Committed and Cooperative*

Quadrant three courts are ideologically committed and cooperative. Its justices would be open to deciding appeals on the basis of policy preferences and, like the legal realists, would probably question the possibility of judging neutrally or objectively on the legal merits. Unlike quadrant one, however, the justices of a quadrant three court would selectively cooperate in order to achieve a better overall match between their own personal policy preferences and the outcomes produced by the court as a whole. Such cooperation could be attractive where justices work to understand each other's ideological commitments and use these understandings to produce well-reasoned and sharply divided opinions.[17] Alternatively, such cooperation could result from a process that more

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[16] This will be the result so long as the variation in ideologically uncommitted assessment of legal merits varies less than the range of ideological commitments on quadrant one courts. This seems likely, though it will not necessarily be the appeal but would depend on the particular appointments process used for a given court and the composition of the court's docket.

[17] There is an argument to be made that such a court would appropriately belong in quadrant one rather than quadrant three if the votes of the justices are not affected by deliberation, only by the reasons given. Moreover, to the extent that the justices are willing to revisit their judgments, such courts will resemble quadrant four courts.

closely resembles the output of a legislature, where members are willing to trade votes and engage in episodic logrolling in order to promote their own individual agendas.[18] A quadrant three court would tend to exhibit more agreement and fewer concurring or dissenting opinions than a quadrant one court. Whether a quadrant three court would exhibit more or less consensus than a quadrant two court would probably depend on the variety and intensity of the policy preferences of the justices, which would influence the mix of sharply divided opinions versus logrolling outcomes that would prevail.

*(d) Quadrant Four: Ideologically Uncommitted and Cooperative*

On an ideologically uncommitted and cooperative court, justices would tend not to steadfastly adhere to certain positions without taking a close look at the legal merits of the appeal and taking the existing law seriously. Further, the cooperative aspect means that the justices would be open to learning from and influencing each other in a good faith attempt at understanding fully the legal merits of the appeal, and collectively forging the reasoning that is most compelling. The consensus and cooperation may also arise from an emphasis on the public good function of decisions in the sense of more clearly settled law. Quadrant four courts will therefore exhibit the highest levels of consensus of any of the types of courts. Open judicial minds, abundant legal talent, mutual respect, diverse personal experiences and backgrounds, and effective communication would characterize an ideal quadrant four court.

## 2. Where Has the Supreme Court of Canada Been Located?

Both quantitative and qualitative analyses are necessary to determine in which quadrant a particular court is located at any given time. However, as the above descriptions illustrate there are some quantitative characteristics of courts in the different quadrants. All else the same, the lowest rates of observed consensus will be associated with quadrant one courts and the highest rates of observed consensus will be associated with quadrant four courts. Quadrant one and three courts may also have

[18] This is consistent with the literature surrounding the "strategic" model of adjudication. For treatments of the strategic model, see Melinda Gann Hall & Paul Brace, "Order in the Courts: A Neo-Institutional Approach to Judicial Consensus" (1989) 42 Western Political Quarterly 391; Epstein & Knight, *supra*, note 4, at 1-18; Maltzman, Spriggs & Wahlbeck, *supra*, note 10.

more predictable groupings than either quadrant two or four courts. The relative rates of consensus for quadrant two and quadrant three courts is unclear, and would depend on such factors as the legal talent of the justices in quadrant two (for example, greater legal ability may lead to more consensus) and the range and intensity of policy preferences of justices in quadrant three (for example, broader scope for logrolling may lead to more observed consensus).[19]

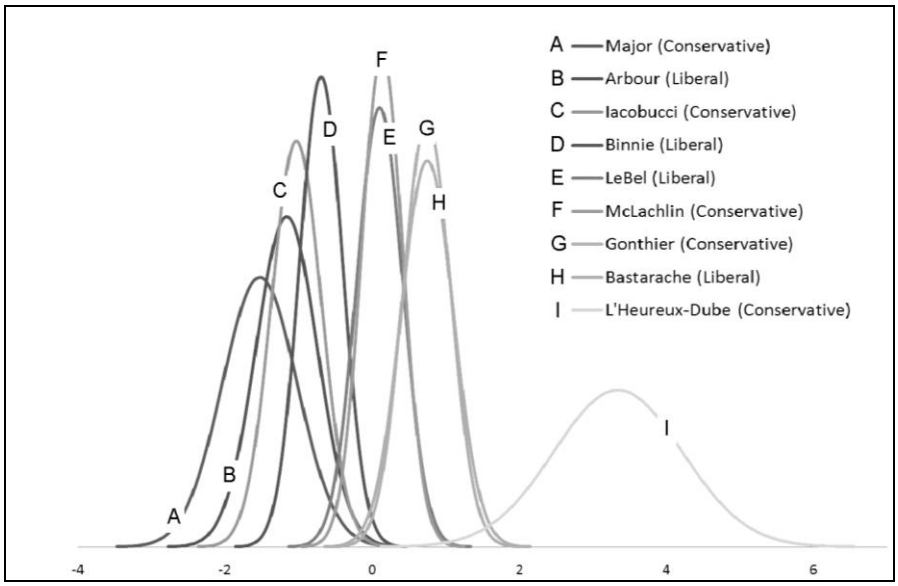
Prior studies of the Supreme Court of Canada provide some evidence as to the location of the Court in the past. Earlier work has found a weak positive connection between how justices vote and indicators of ideology. In other work we have analyzed the decisions of the Supreme Court of Canada using Martin and Quinn's methodology, which they developed and deployed in studying the U.S. Supreme Court.[20] This method provides estimated "ideal point distributions" for each justice in all appeals in the post-Charter period. These ideal point distributions represent the ideological predispositions of the justices; in essence, they indicate which justices tend to vote in which direction. Our earlier analysis shows that with the exception of L'Heureux-Dubé J., the justices seem to be closely clustered with each other, with considerable overlap in the distributions of their ideal points. Justice L'Heureux-Dubé's ideal point was substantially to one side of those of other justices, with limited overlap. Interestingly, the party of the appointing Prime Minister turned out to be a poor predictor of where each justice's ideal point lay relative to other justices. While there was some connection between the ideal points and the party of the appointing Prime Minister, the Liberal and Conservative appointees were closely clustered and somewhat mixed together. The following figure presents the ideal points for Supreme Court of Canada justices in the 2000-2001 Term. Moving from left to right (and from more liberal to more conservative), the figure shows the ideal point distributions for Major J., Arbour J., Iacobucci J., Binnie J., LeBel J., McLachlin C.J.C., Gonthier J., Bastarache J. and L'Heureux-Dubé J. Four of the justices, Arbour J., Binnie J., LeBel J. and Bastarache J., were appointed by Liberal Prime Ministers. The five remaining justices were appointed by Progressive Conservative Prime Ministers. The results demonstrate not only how clustered our justices

[19] It is theoretically possible that a quadrant three court could exhibit even more consensus than a quadrant four court depending on the mix of policy preferences of the justices and by relieving some constraints on the bargaining, for example, by allowing for side-payments rather than in-kind, vote for vote trades.

[20] Alarie & Green, "Policy Preference Change", *supra*, note 1.

are, with the obvious exception of L'Heureux-Dubé J., but also how ineffective the appointing Prime Minister's party is likely to be as a proxy for the justice's policy preferences.

**Figure 2: Supreme Court of Canada Ideal Point Distributions 2000-2001 Term**




In our earlier work we also undertook a more "direct" method of analyzing the connection between justices' votes and their ideology by categorizing votes in particular areas of law as "liberal" and "conservative".[21] A similar direct methodology has also found a connection in the U.S. between a justice's votes and the party of the appointing President, particularly in the area of civil rights and liberties.[22] Consistent with the results using the Martin and Quinn method, we found a weak connection between the voting pattern of a justice and the party of the Prime Minister who appointed the justice.

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[21] *Id.*

[22] See Nancy C. Staudt, Lee Epstein & Peter J. Wiedenbeck, "The Ideological Component of Judging in the Taxation Context" (2007) Northwestern University School of Law, Public Law and Legal Theory Research Paper Series Working Paper No. 07-14 [hereinafter "Staudt, Epstein & Wiedenbeck"].

These results are also consistent with other recent empirical studies of the Supreme Court of Canada.[23]

In terms of levels of consensus, the Supreme Court of Canada rendered unanimous decisions approximately 60 per cent of the time in the period 1990-2000, unlike the U.S. Supreme Court, which rendered unanimous judgments about 40 per cent of the time.[24] This level of agreement has varied over time, ranging from a high of approximately 87 per cent in 1980 to a low of approximately 47 per cent in 1990.[25] This higher rate of unanimity suggests that the Supreme Court of Canada is more oriented towards consensus in decision-making, although it is also consistent with other possible explanations, such as higher levels of logrolling (*i.e.*, only apparent, not real, consensus), dispositional similarities among justices, and a less ideologically divisive docket (*i.e.*, appeals that are easier "on the merits"). One reason to suspect that the Supreme Court of Canada may face a less ideologically divisive docket would be that in certain criminal appeals, accused persons may appeal as of right.[26] Another factor affecting the higher rate of unanimity on the Supreme Court of Canada may be the Court's frequent practice of sitting in panel sizes of seven or five instead of as a full panel of nine justices. The effect of smaller panel sizes may be mitigated to some extent, however, by the Court's tendency to assign fewer justices to appeals that are considered to be less controversial or divisive. Most important Charter appeals, for example, will be heard by all nine justices.

The Supreme Court of Canada has been weakly ideological and relatively cooperative in the post-Charter period. It therefore may have been in quadrant one or three, but given the observed voting patterns of the justices, the Court as a whole could be in any one of the four quadrants and different justices may individually tend towards different quadrants. If the range of the justices' actual policy preferences happens

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[23] Ostberg & Wetstein, *supra*, note 1.

[24] See, *e.g.*, Peter McCormick, "'With Respect…' Levels of Disagreement on the Lamer Court, 1990-2000" (2003) 48 McGill L.J. 89, at 97. According to McCormick, of the 959 appeals heard by the Lamer Court from 1990-2000, 58.4 per cent were decided unanimously. Some justices, perhaps not surprisingly, tended to vote together with greater frequency than others. See Peter McCormick, "Birds of a Feather: Alliances and Influences on the Lamer Court 1990-1997" (1998) 36 Osgoode Hall L.J. 339.

[25] See McCormick, "Blocs", *supra*, note 8, at 130.

[26] Over the period beginning with the start of the 2000 Term to the end of the 2008 Term, the Supreme Court of Canada heard on average 14.3 appeals per term as of right, comprising 21.6 per cent of the Court's docket. See Supreme Court of Canada, "Statistics 1998-2008" (March 5, 2009), online: <http://www.scc-csc.gc.ca/stat/html/cat3-eng.asp> [hereinafter "Supreme Court of Canada Statistics"].

to be narrower than in the U.S., then the Canadian Court could be in quadrant one.[27] Given the "brokerage" model of politics in Canada in the past and the lack of significant differences in policy preferences in most areas across parties, particularly in the 1980s and 1990s,[28] the appointees to the Court may have been largely similar ideologically. The resulting voting behaviour would appear to be convergent, with small differences in voting patterns between justices appointed by Prime Ministers of each party corresponding to the small differences in ideology between the parties and appointees. Alternatively, the justices may be voting in accordance with their policy preferences in a strategic way through logrolling. That would place the Court in quadrant three.

There are also explanations for the Court being in either quadrant two or four. The appointment process may have resulted in justices who do not vote in any particular ideological pattern, but who deliberate together to reach decisions. The resulting narrow distribution of voting patterns would then reflect the outcome of deliberation rather than the influence of initial policy preferences, placing the Court in quadrant four. Alternatively, the Court could be in quadrant two, where the justices do not vote according to personal policy preferences and do not cooperate, so long as the justices tend to independently arrive at the same conclusion. This result is possible but it seems more likely that the high level of agreement on the Court in this period is not associated with independent voting, but rather with cooperation.

It is therefore difficult from the general data to determine confidently in which quadrant the Court has been located in the post-Charter period.

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[27] There is some evidence that the initial differences between justices (as opposed to particular issues) do not vary significantly. Ostberg and Wetstein have ranked justices on a scale of -2 (very conservative) to +2 (very liberal) based on an analysis of newspaper editorials on the justices at the time of their appointment. Justices appointed by the Conservative Prime Ministers have had mixed rankings, with four justices considered to be conservative or very conservative, five considered liberal or moderately liberal, and one essentially neutral (Iacobucci J.). Those appointed by Liberal Prime Ministers, on the other hand, were predominantly liberal, with nine justices considered to be liberal or moderately liberal, one conservative (LeBel J.), and one neutral (Deschamps J.). See Ostberg & Wetstein, *supra*, note 1, at 55. These scores, which were set for most but not all of the justices in the period 1982 to 2004, are based on an analysis of editorials in nine Canadian regional papers. The methodology was originally developed for the U.S. Supreme Court. See Jeffrey Segal & Albert Cover, "Ideological Values and Votes of U.S. Supreme Court Justices" (1989) 83 American Political Science Review 557. Interestingly, these assessments of personal policy preferences do not appear to correspond in more than a weak way with the voting differences of justices upon appointment. See Alarie & Green, "Policy Preference Change", *supra*, note 1.

[28] See, *e.g.*, Harold D. Clarke, Jane Jenson, Lawrence Leduc & Jon H. Pammett, "Absent Mandate: Canadian Electoral Politics in an Era of Restructuring" in Hugh G. Thorburn & Alan Whitehorn, eds., *Party Politics in Canada*, 8th ed. (Toronto: Prentice Hall, 2001) 398.

However, the general analysis may mask a clearer story hiding in the underlying data. In particular, in this article we focus on two factors which may impact the analysis. First, the levels of consensus and ideological voting may change over time. These changes may result because of a change in the justices on the Court. Some justices may be more or less ideological and cooperative than others, changing how the Court as a whole behaves in any particular term. Moreover, the Chief Justice may influence these factors.[29] She may, for example, have particular norms about the optimal degree of consensus on the Court, may tend to set larger or smaller panels (thereby changing the likelihood of consensus) or, more controversially, use her power to select panels to influence voting on particular appeals.[30] Second, particular types of appeals may be particularly divisive along party lines in Canada. If so, the ideological differences in particular types of appeals may be concealed underneath a more general tendency to vote non-ideologically and cooperatively.

To test whether these factors may lead to a different sense of the Court's behaviour, in this paper we examine Charter appeals during the McLachlin era. At first glance, Charter appeals would appear to provide a basis for clear ideological differences which may show up in the connection of voting to *ex ante* indicators of ideology, the groupings of particular sets of justices and the levels of cooperation.[31] Choosing the decisions under a particular Chief Justice allows us to at least notionally hold constant the influence of the Chief Justice in terms of norms of consensus and panel size and selection, assuming that she has been consistent in her approach to these issues over her tenure. The results of our analysis are set out in Part III.

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[29] See McCormick, "Blocs", *supra*, note 8, discussing levels of agreement and disagreement on the Court from the Fauteux Court onwards.

[30] See Benjamin Alarie, Andrew Green & Edward Iacobucci, "Is Bigger Always Better? On Optimal Panel Size, with Evidence from the Supreme Court of Canada" (October 28, 2008) University of Toronto Legal Studies Research Series No. 08-15, online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1152322> [hereinafter "Alarie, Green & Iacobucci"].

[31] See McCormick, *supra*, note 24, arguing that the Charter has led to increased disagreement on the Court. See also 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, finding that after initial levels of agreement, levels of disagreement rose quite rapidly in Charter appeals.

## III. IDEOLOGY AND COOPERATION ON THE MCLACHLIN COURT

In order to examine the current trends in the Court concerning ideology and cooperation, we analyzed all the judgments of the Supreme Court of Canada coinciding with Chief Justice McLachlin's leadership. The appeals we examined thus run from (in neutral citations) 2000 SCC 1 (judgment released January 13, 2000) to 2009 SCC 16 (judgment released April 2, 2009).

Of the 689 judgments issued by the Court over this period, we focused on appeals which featured a Charter claim. The 105 judgments in which Charter claims were addressed were coded for a number of basic characteristics including the sections of the Charter that were raised by the claimant, whether the context for the claim was a criminal appeal (or extradition), whether the judgment of the Court was unanimous, how each justice voted, and whether the justice wrote reasons in the appeal. We used two methods to analyze these 105 Charter judgments. The first is a "direct method" in which we assign "conservative" and "liberal" labels to the judgments of the Court and its justices. The second is an "indirect" method popularized by political scientists Andrew Martin and Kevin Quinn in the study of the judgments and the justices of the U.S. Supreme Court, which uses a flexible Bayesian methodology to "back-out" the implicit policy preferences of the justices. We deploy this indirect method using the same 105 Charter decisions. The evidence regarding ideology and cooperation using the direct method is discussed first, followed by a discussion of the evidence as analyzed using the indirect method.

### 1. The Direct Method

Using the direct method each judgment was assessed according to whether the judgment was in favour of the Charter claimant or in favour of the government. With one exception, a vote in favour of the claimant in each Charter appeal was considered to be "liberal" and a vote in favour of the government was considered "conservative". The exception was in appeals involving a business making a Charter claim where a vote in favour of the claimant was considered to be conservative. This coding is based on an approach in recent studies of judicial behaviour in the

U.S.[32] While there may be disagreements in the context of a particular appeal about whether the coding is an accurate description of particular appeals, the coding aids in determining whether the voting behaviour of the justice accords with other indicators of ideology.[33]

The table below provides an overview of the Court's decisions in Charter appeals in this period. Using our definition of liberal and conservative decisions, the Court's liberal voting rate was 46.09 per cent over the relevant period. One popular way to look for the role of ideology on appellate courts is to examine voting differences according to the party of the appointing Prime Minister, or President in the U.S. context.[34] Considering the universe of Charter appeals decided by the Court, the justices appointed by Liberal Prime Ministers were more likely to vote "liberally" than were their counterparts appointed by Conservative Prime Ministers (46.82 per cent versus 44.94 per cent). The margin, however, is not dramatic, and should be interpreted as relatively weak evidence of ideological voting over the set of Charter appeals considered as a whole.

**Table 1: Rates of "Liberal" Voting and Rates of Unanimity Across Charter Appeals**

| | All Charter | Criminal | Equality | Non-Equality |
|---|---|---|---|---|
| Number of judgments, 2000-2009 | 105 | 57 | 25 | 80 |
| Rate of "liberal" votes in aggregate | 46.09% | 41.45% | 50.00% | 44.88% |
| "liberal" vote rate by Liberal appointees | 46.82% | 42.57% | 55.20% | 44.25% |
| "liberal" vote rate by Conservative appointees | 44.94% | 39.54% | 41.98% | 45.88% |
| Unanimity rate | 58.10% | 61.40% | 48.00% | 62.50% |

[32] See, *e.g.*, Sunstein *et al.*, *supra*, note 3. For Canada, see Ostberg & Wetstein, *supra*, note 1, C. Neal Tate & Panu Sittiwong, "Decision-making in the Canadian Supreme Court: Extending the Personal Attributes Model Across Nations" (1989) 51 Journal of Politics 900; and Donald Songer & Susan Johnson, "Attitudinal Decision Making in the Supreme Court of Canada" (Paper presented at the Midwest Political Science Association Meetings, 2002) [unpublished].

[33] A list of the 105 Charter appeals and our coding of the judgment of the Court in each appears in Appendix A.

[34] See, *e.g.*, Staudt, Epstein & Wiedenbeck, *supra*, note 22, at 3 and 5, describing a number of methods for estimating political preferences of justices.

The matters involved in Charter appeals arise in a wide variety of contexts that do not necessarily raise the same or even closely related issues. For that reason, we also examined two particular sub-categories of Charter appeals: section 15 equality claims and Charter appeals that involved criminal matters; there were a few appeals that raised both which are counted in each group. There were 57 Charter appeals in this period involving criminal charges or extradition,[35] and 25 appeals involving section 15 claims.

In the criminal appeals involving a Charter claim, the Court had a significantly lower liberal voting percentage (41.45 per cent) than for all Charter appeals (46.09 per cent) and exhibited a higher rate of unanimity (61.40 per cent versus 58.10 per cent for all Charter appeals). These differences may in part be because in certain criminal appeals (such as where there is a dissent at the appellate court) the accused person may appeal as of right.[36] Such appeals are — at least on average, though of course not necessarily and not in all appeals — likely to pose legal issues that are somewhat less challenging and of somewhat less social importance than appeals heard by the Court with leave.[37] Considering the criminal Charter appeals decided by the Court over this period, the justices appointed by Liberal Prime Ministers were more likely to vote "liberally" than were their counterparts appointed by Conservative Prime Ministers (42.57 per cent versus 39.54 per cent). The margin, although higher than for the universe of all Charter appeals decided by the Court over the period, was again not dramatic, and should be interpreted also as relatively weak evidence of ideological voting.

Equality claims under section 15 of the Charter were significantly more divisive for the Court than the full set of Charter appeals and the subset of criminal Charter appeals. The number of liberal votes in equality appeals was precisely equal to the number of conservative votes (103 "liberal" votes versus 103 "conservative" votes) overall, which is more liberal than the Court's average over all the Charter appeals of 46.09 per cent. Justices appointed by Liberal Prime Ministers were considerably more likely to vote liberally than were their counterparts appointed by Conservative Prime Ministers in equality appeals (55.20

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[35] Included in this figure are a number of extradition appeals that might more appropriately be classified as immigration matters; however, we think that because the extradition process at issue typically involves criminal charges in another jurisdiction, they are appropriately classified as criminal for our purposes.

[36] See Supreme Court of Canada Statistics, *supra*, note 26.

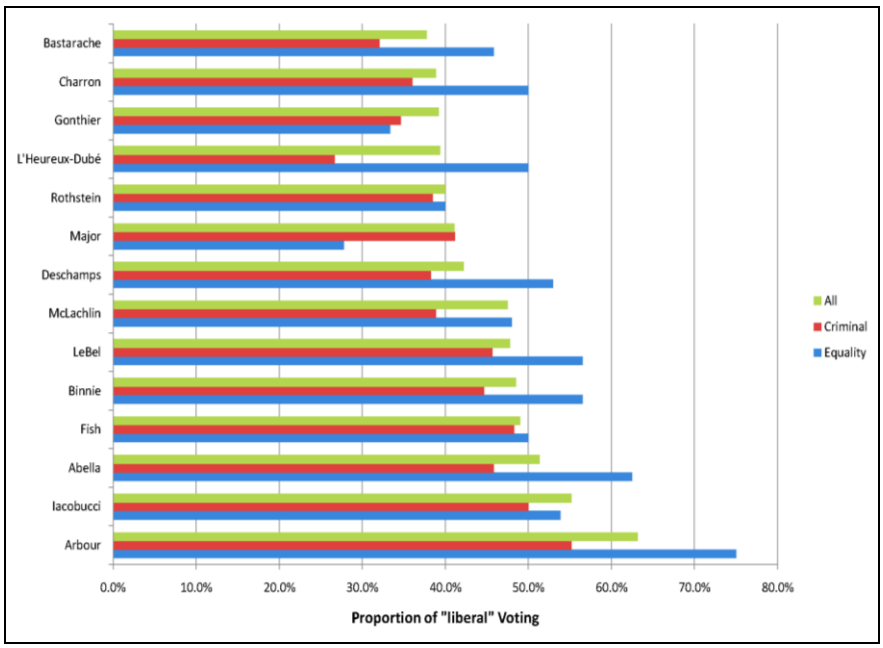
[37] See Alarie, Green & Iacobucci, *supra*, note 30.

per cent versus 41.98 per cent). This margin, far higher than for the universe of all Charter appeals and the subset of criminal Charter appeals decided by the Court over the period, should be interpreted as relatively strong evidence of ideological voting in the context of section 15 equality appeals. It is worth noting, however, that there were just 25 equality appeals decided by the Court over this period, which does somewhat reduce the significance of this difference.

Interestingly, the difference in liberal voting rates between justices appointed by Liberal Prime Ministers and those justices appointed by Conservative Prime Ministers appears to be driven entirely by the stronger proclivity among Liberal appointees to vote in a liberal way in equality appeals. In the 80 non-equality Charter appeals decided by the Court, Conservative appointees were actually slightly more likely to vote in a liberal way than were the Liberal appointees (45.88 per cent versus 44.25 per cent). Thus, using the direct method there is relatively weak evidence for ideological voting along the lines of the party of the appointing Prime Minister, with the exception of equality appeals, where it seems that there is considerably stronger evidence.

The following figure sets out the liberal voting percentages for each justice, which may assist in revealing attitudes in different areas for particular justices that are obscured by aggregating the results for justices appointed by the same Prime Minister. For example, although both Bastarache J. and Arbour J. were appointed by Prime Minister Jean Chrétien, the two justices tended to vote at opposite ends of the spectrum in Charter appeals.

**Table 2: Proportion of "Liberal" Voting, Charter Appeals Supreme Court of Canada, 2000-2009**

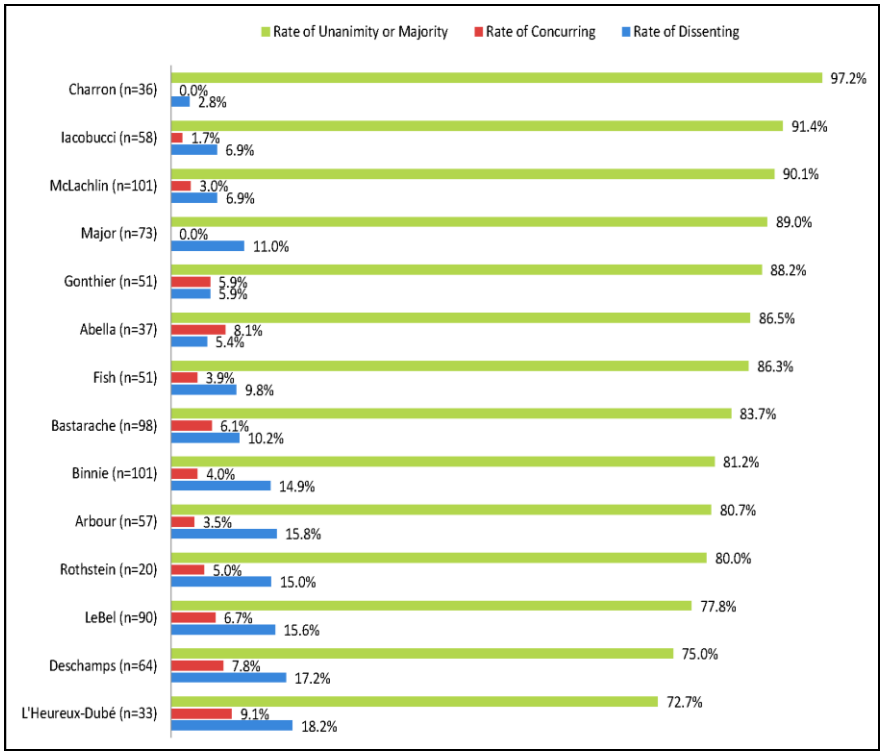



Other noteworthy evidence emerging from the direct method is that although most justices are consistently liberal or conservative in both criminal and equality appeals, this is not always the case. Indeed, at least one justice, Major J., is liberal in criminal Charter appeals and conservative in equality appeals, and two justices, L'Heureux-Dubé J. and Deschamps J., exhibit an opposite pattern of being relatively conservative in criminal appeals and relatively liberal in equality appeals. Thus, there is some evidence of individual policy preferences being expressed by justices, even if the expression of policy preferences by individual justices does not appear to reflect systematic differences by the appointing Prime Minister outside of the equality context.

With respect to cooperation on the Court, there was a considerable degree of unanimity in Charter appeals during this period, which is consistent with the Court's practices in earlier periods. Significantly, more than half, 58.10 per cent, of the Charter decisions were decided unanimously, which is in line with the rates of unanimity prevailing under Lamer C.J.C. in the 1990s. Looking across the decisions of individual justices, there are differences in the willingness of different

justices to sign onto unanimous judgments, but overall the levels of unanimous decision-making is high, ranging from a low of 50 per cent for Rothstein J. to a high of 66.67 per cent for Charron J.[38] With respect to siding with the majority of the other justices — something which an individual justice can control (the presence of a dissenter can destroy the prospect of a unanimous judgment), Charron J. stands out as a strong cooperator, siding with the majority of the Court (*i.e.*, not dissenting or giving concurring reasons) in 97.2 per cent of the Charter appeals in which she has participated. The least cooperative justice using this metric is L'Heureux-Dubé J., who sided with the majority at a rate of 72.7 per cent.

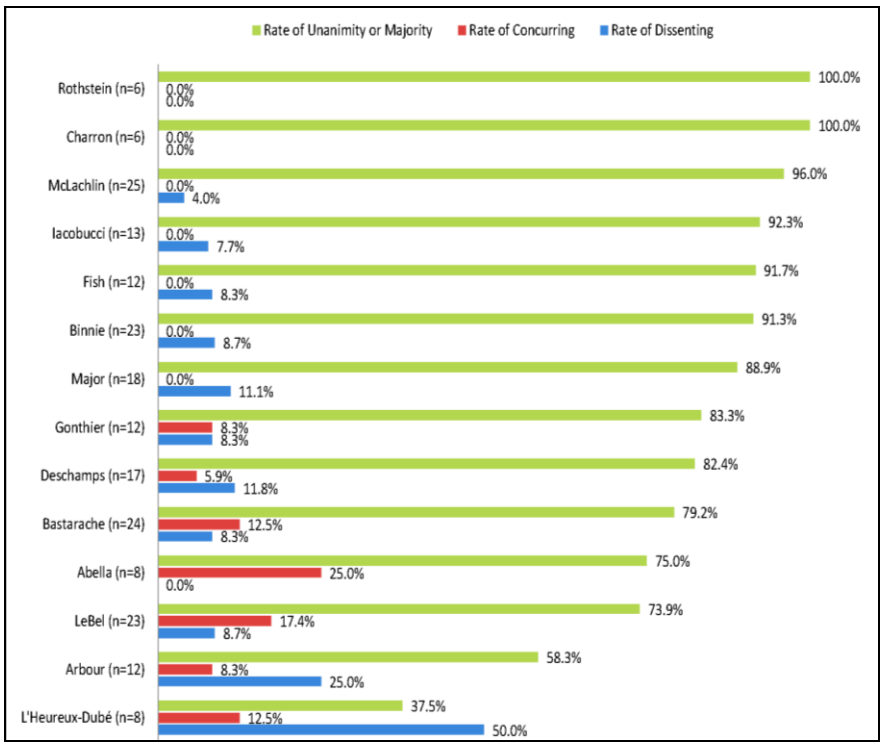
**Table 3: Disposition of All Charter Appeals**
**Supreme Court of Canada, 2000-2009**




[38] These justices may be outliers because of their relatively short tenure on the Court. We expect that their rates of participating in unanimous decisions will fall into line with the other justices as they participate in more Charter appeals.

As with the evidence on the role of ideology or policy preferences, equality appeals had a different pattern in terms of cooperation than Charter appeals more generally or appeals that raised both criminal and Charter issues. The most cooperative justices in equality appeals appear to be McLachlin C.J.C. and Rothstein J., Charron J., Iacobucci J. and Fish J., who each sided with the majority, *i.e.*, did not dissent or offer concurring reasons, in more than 90 per cent of the equality appeals in which they participated. This norm of cooperation, however, was not shared by all the justices. For example, L'Heureux-Dubé J. dissented in 50 per cent, four of eight, of the equality appeals in which she participated during the tenure of McLachlin C.J.C. as Chief Justice, and cooperated in just 37.5 per cent of the equality appeals over this period (which is low even compared with her cooperation rate of 72.7 per cent in all of her Charter appeals). Justice Arbour dissented in 25 per cent (three of twelve) of the equality appeals she participated in deciding and cooperated in just 58.3 per cent of the equality appeals in which she participated, far below her overall cooperation rate in all Charter appeals of 80.2 per cent.

**Table 4: Disposition of Equality Charter Appeals**
**Supreme Court of Canada, 2000-2009**




Taken as a whole, the direct method of analyzing the 105 Charter appeals decided since January 1, 2000 suggests that there has been a relatively low level of ideological voting overall, and a relatively high level of cooperation among the justices of the Supreme Court of Canada. The one exception is in the context of equality appeals, where it appears that the party of the appointing Prime Minister carries some information about the policy preferences of the justices.

## 2. The Indirect Method

Because of the potential contestability of the liberal and conservative coding of votes, we also analyzed the data using the method developed

by Martin and Quinn (which we refer to as the indirect method).[39] This method provides an ideal point distribution for each justice in Charter appeals in this period. These ideal point distributions are supposed to represent the latent policy preference predispositions of the justices — that is, they are expected to indicate which justices tend to vote in which direction. The indirect method is based on the Bayesian estimation of a one-dimensional item response theory model using a computationally intensive Markov chain Monte Carlo process.[40]

A number of assumptions are made in setting up the model of judicial decision-making that underlies the method. First, it is assumed that the relevant attitudinal or policy space is one-dimensional — *i.e.*, a line or spectrum. Second, the model assumes implicitly that justices vote in accordance with their simple preferences, in keeping with an attitudinal model of decision-making.[41] We do not model any strategic interactions between the votes of different justices, and ignore any potential "panel effects" that may arise from certain justices being affected by the presence of other justices on the same panel.[42] Thus, a vote to affirm indicates that, given their ideal policy point, affirming gives a particular justice more utility than reversing the appeal. In addition, because of the small number of appeals (n=105), Bayesian priors ("positive" or "negative") were assigned to the justices with the two highest and two lowest rates of finding in favour of Charter claimants.

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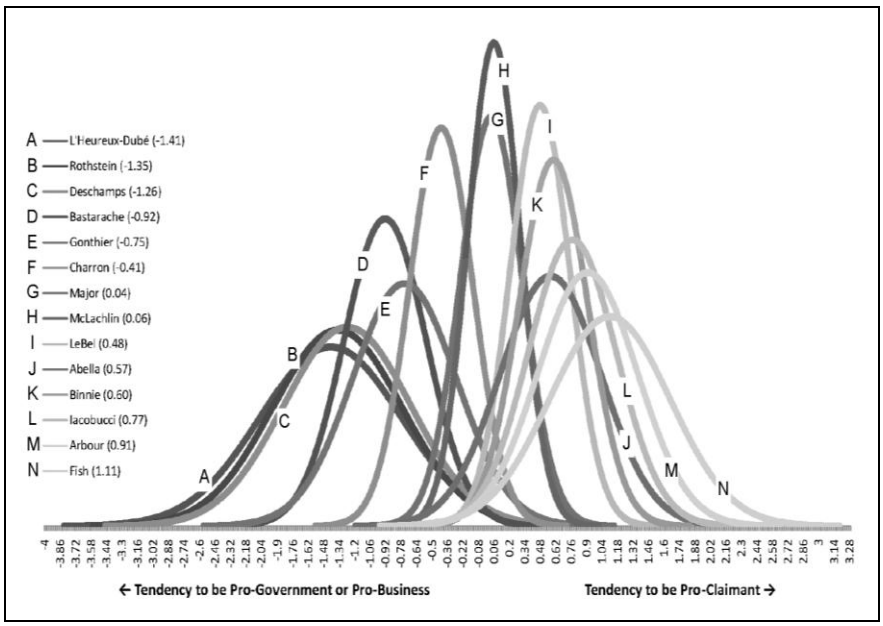
[39] See Andrew D. Martin & Kevin M. Quinn, "Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953-1999" (2002) 10 Political Analysis 134; Martin *et al.*, *supra*, note 3; Andrew D. Martin, Kevin M. Quinn & Lee Epstein, "The Median Justice on the U.S. Supreme Court" (2005) 83 N.C.L. Rev. 1275; and Andrew D. Martin & Kevin M. Quinn, "Assessing Preference Change on the U.S. Supreme Court" (2007) 23 J.L. Econ. & Org. 303. Martin and Quinn maintain a website on which they report updated empirical findings as new decisions are rendered by the U.S. Supreme Court. The website is accessible online: <http://mqscores.wustl.edu/>.

[40] See Alarie & Green, "Policy Preference Change", *supra*, note 1, for a more detailed discussion of the method and its implications in the Canadian context.

[41] This assumption can be supported on the basis that given that the Martin-Quinn method uses only non-unanimous appeals, these are appeals in which justices truly do have the discretion to go either way in their disposition of the appeal.

[42] This is an oversimplification. Research by Cass Sunstein in the United States has shown that panel effects can be significant on Circuit Courts of Appeal: see Sunstein *et al.*, *supra*, note 3.

**Figure 3: Estimated Ideal Point Distributions in All Charter Appeals Justices of the Supreme Court of Canada, 2000-2009**



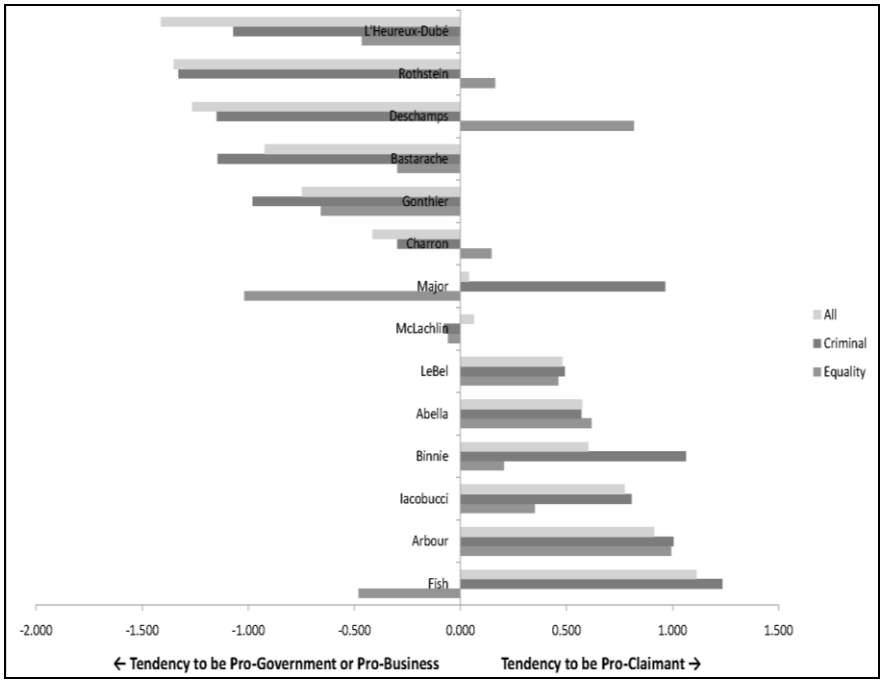

**Note:** Judges are listed in the legend in left to right order, based on the mean of each judge's ideal point distribution.

The results of the indirect method are similar to the analysis of the liberal percentage voting records of the justices. The result of the indirect method considering all the Charter appeals in the period is a weak correlation between the party of the appointing Prime Minister and the justices' mean ideal points, not unlike the result under the direct method. For all Charter appeals, the average mean of the ideal point distributions for Liberal appointees is +0.135 versus -0.439 for Conservative appointees, resulting in a gap in the mean of the ideal point distributions of 0.574. The results were similar for the difference between the average mean of the ideal point distributions with only criminal Charter appeals considered, with Liberal appointees having an average ideal point of 0.222 and Conservatives of -0.281. Finally, the differences were again similar for the average mean of the ideal point distributions of the justices in equality appeals, with Liberal appointees having an average ideal point of 0.308 and Conservative appointees of -0.281. These results appear to support the idea that Conservative appointees tended to vote slightly

more conservatively than Liberal appointees overall. However, the results are not as consistent with the findings of the direct method with respect to the particularly divisive nature of the equality appeals.

It should be emphasized, however, that when all Charter appeals are grouped together, the ideal point distributions of the justices may in some appeals be misleading. This is particularly the case for those such as Major J., who is liberal in criminal Charter appeals and conservative in equality appeals, and L'Heureux-Dubé J. and Deschamps J., who tend to be conservative in criminal Charter appeals and liberal in equality appeals. These peculiarities are illustrated by the following diagram, which shows, for example, that even though McLachlin C.J.C. and Major J. had a very similar ideal point distribution when all Charter appeals are analyzed, their manner of reaching that estimated ideal point distribution was very different, with Major J. being quite liberal in criminal Charter appeals and quite conservative in equality appeals, whereas McLachlin C.J.C. tended to be a consistent centrist.

**Table 5: Estimated Mean Ideal Points, Charter Appeals Supreme Court of Canada, 2000-2009**



The upshot of the part of the analysis involving the indirect method is that the justices of the Court have a high degree of overlap in their ideal point distributions when all Charter appeals are considered. This overlap implies a relatively unpredictable pattern of which justices will join a majority opinion or dissent. The indirect method tends to produce results with more sharply defined distributions when, as at the U.S. Supreme Court, there are fairly predictable ways in which panels will split (if and when a panel splits). The relative lack of predictability in Canada and the overlap in the ideal point distributions found using the indirect method in turn suggests that the Court has been neither overly ideological nor uncooperative in the post-2000 period under Chief Justice McLachlin with respect to Charter decisions.

## IV. WHICH QUADRANT BEST FITS THE SUPREME COURT OF CANADA?

As noted previously, quantitative and qualitative analysis is necessary to fully understand the decisions of the Court. The results of the analysis in Part III provide some evidence of where the Court has been located in a particular time period and in a particular area of law. The Charter appeals in the McLachlin era do exhibit some distinct patterns in terms of both ideology and cooperation. These patterns have important implications for issues such as the appropriate appointments process for the Court.

Before discussing the implications for the appointment process, it is important to draw out some of the findings in terms of this framework. The results of Part II show that generally there has been a very high rate of cooperation for Charter appeals in this period. The rate of unanimity for all Charter appeals was high. However, the high rate of unanimity obscures significant differences across justices and areas of law. The one notable exception was that in equality appeals justices tended towards fewer unanimous decisions, but at the same time also tended to have fewer dissents and a greater than average number of concurring judgments. The implication of these results is that in general the Court in Charter appeals has been slightly more cooperative than for all appeals it decides, but for equality appeals the Court has tended to be less cooperative.

In terms of ideology, there is a weak correlation between justices on the McLachlin Court and indicators of ideology when all Charter appeals

are considered together. This weak correlation also holds for criminal Charter appeals and is similar to results for all appeals found in prior empirical studies.[43] However, once again equality appeals exhibit a different pattern. The correlation between ideology and voting in equality appeals in this period appears much greater than in either general Charter appeals, criminal Charter appeals or in prior analysis of all appeals in the post-Charter period. One telling indicator is that the liberal voting percentage for Liberal appointees is 14 per cent higher than for Conservative appointees in equality appeals in this period. Interestingly, an earlier study by Ostberg and Wetstein had found ideology to be insignificant in equality cases, although it also found a significant difference in liberal voting rates. However, their study was over a different time period and involved equality cases beyond those that invoked section 15 of the Charter.[44]

The implication for the location of the Court over this period is that if all Charter appeals are grouped together, the Court appears to be in a similar position to an analysis of all appeals lumped together. The Court appears to be weakly ideological and cooperative, although still slightly further towards the cooperative end of the spectrum than for all appeals. For criminal Charter appeals, the Court is pushed even further towards the cooperative end. However, the results for all Charter appeals and for criminal Charter appeals may be partially influenced by the criminal appeals which came before the Court as of right. In these appeals either an acquittal was overturned on appeal or the appellate court was split in its decision. These appeals should, on average, tend to be easier on average than other appeals and tend to be assigned smaller panels. These factors should mean these appeals would tend to exhibit higher rates of cooperation.[45] Further, if we assume a higher than average rate of dismissal for these appeals (because these appeals are guaranteed an appeal where an acquittal is overturned, regardless of the merits of the appeal) and these dismissals are coded as conservative, they will tend to make both Liberal and Conservative appointees appear more

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[43] Alarie & Green, "Policy Preference Change", *supra*, note 1. See also Ostberg & Wetstein, *supra*, note 1, finding correlation between criminal appeals involving right to counsel or search and seizure issues and ideology as measured by the party of the appointing Prime Minister to be positive but insignificant, but finding a stronger and significant correlation with ideology as measured by scores based on newspaper editorials at the time of the appointment of the particular justice.

[44] Ostberg & Wetstein, *id*. They include s. 15 cases as well as cases under provincial human rights legislation.

[45] See Alarie, Green & Iacobucci, *supra*, note 30.

conservative, potentially disguising a difference in appeals where there is an actual dispute. An indication that the appeals for which leave to appeal was sought may in fact be quite divisive is that the rate of dissents is high for all criminal Charter appeals despite the overall level of unanimity expected for as of right appeals.

However, while there may not be an apparent difference in Charter or criminal Charter appeals, there does appear to be a difference for equality appeals in the McLachlin era. The Court in these appeals appears to be less cooperative — that is, there is less unanimity — but at the same time there is a high rate of concurrences. The high rate of concurrences points to justices finding value in presenting their own ideological views rather than in speaking in a single voice. Moreover, there is a stronger connection between indicators of ideology and voting in equality appeals. For example, there is a larger difference in the average liberal voting percentages between Liberal and Conservative appointees (an approximately 14 per cent difference for equality appeals as opposed to about 5 per cent for criminal Charter appeals and 4 per cent for all Charter appeals). The Court in equality appeals therefore may be located more towards quadrant one — that is, less cooperation and more ideology. The higher rate of agreement of the justices in the majority of areas of law may dominate the differences in the divisive areas when considering the Court's decisions quantitatively as a whole. Quadrant three is also a possibility.[46]

However, there are some interesting features in the voting by particular justices which point to individual justices being in different quadrants. First, there are significant differences in how justices voted, both in ideology and cooperation. For example, the spread between the highest and lowest liberal voting percentages is 25.4 per cent for all Charter appeals, 28.5 per cent for criminal Charter appeals, and 47.2 per cent for equality appeals. In terms of cooperation, the rates of justices signing onto either unanimous or majority judgments varies widely from 97.2 per cent to 72.7 per cent for all Charter appeals, 96 per cent to 69.2 per cent for criminal Charter appeals, and 100 per cent to 37.5 per cent for equality appeals. These large differences indicate significant variance in individual approaches to these issues which may mean that, at least at the extremes, different justices will be in different quadrants — they may conceive of the judicial role quite differently.

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[46] See Alarie & Green, "Policy Preference Change", *supra*, note 1, discussing the differences in preferences by parties in particular areas.

Second, some justices shift their positions across areas of law significantly. Justices Major and Charron provide interesting examples. Justice Major changes from having the median liberal voting percentage for criminal Charter appeals to having the lowest liberal percentage voting rate for equality appeals. This shift can also be seen in the shift from the right to the left of the distribution in terms of ideal policy points. Justice Charron exhibits an opposite pattern. She had a low liberal voting percentage relative to the Court for criminal Charter appeals, but was at the Court's average for liberal voting in equality appeals. In terms of mean ideal points, she moved from the left of the Court's average mean ideal point for criminal Charter appeals to the right for equality appeals. These differences make it difficult to pinpoint a particular justice's attitude across all areas of law.

Third, the voting record of McLachlin C.J.C. raises interesting questions about her role on the Court, both in terms of the voting by other members and any norm of cooperation. In terms of voting, she is quite clearly in the middle of the distribution. This middle position is seen most starkly in the ideal point diagrams, where she rests squarely in the middle. It can also be seen in the liberal voting percentage data as she is essentially at the median for all Charter appeals, for criminal Charter appeals and for equality appeals. She is also only slightly above the average liberal voting percentage for all Charter appeals and slightly below for criminal Charter appeals and equality appeals. In terms of cooperation, she has very high (and well above average) rates of signing onto majority or unanimous decisions in all three categories and below-average rates of concurrences and dissents.

Chief Justice McLachlin's voting patterns could indicate that she fosters cooperation and brings other justices to a common position.[47] This cooperative role would mean that her voting would appear at the mean/median of the liberal voting rates and her ideal point would be at the centre of the distribution. She may be able to achieve such cooperation through deliberation and fostering a norm of consensus. She may, on the other hand, at least partially be able to bring about such convergence through her ability to select panel sizes and compositions. A Chief Justice's power to select panels provides an opportunity to both reduce panel sizes on certain appeals (which raises the likelihood of agreement) and select compositions which are more likely to foster a

[47] See McCormick, *supra*, note 24, arguing that the identity of the Chief Justice has mattered over time to the level of disagreement on the Court.

particular policy outcome. More empirical study is needed of the ability of Chief Justices to select panel sizes and composition and its effect on outcomes.[48]

What does all this mean for the evolution of the Supreme Court? It is clear that the role of ideology and cooperation will vary by area of law. While there may not be an obvious concern with the Court as it votes as a whole, the identity of those on the Court and on particular appeals will matter in some areas. This connection in turn makes the appointments process matter. However, the key question is — matter in which direction? Does this point in the direction of the need for a more neutral appointments process? Eric Posner points out that to the extent that there is a single correct answer to a particular issue, a more neutral process with the aim of not having ideologically inclined justices may be preferable.[49] However, the risk with such a process is that it produces "safe" appointments that do not bring a diversity of views to issues.[50] A diversity of views may be desirable if an issue does not admit of a single correct answer and the difference across justices permits greater debate and deliberation on the issues.[51]

Does this mean that we should want a more politicized appointments process? Such a process, like that in the U.S., may allow more thorough vetting of possible appointees and therefore a more informed choice. Further, politicization may allow a greater connection between the views of the appointees and the prevailing public opinion. To the extent there is no single correct answer to particular issues, it is possible that some greater connection to public opinion may be desirable.[52] The difficulty is, of course, that such vetting may lead to less predictable judgments and potentially to greater tendency towards logrolling. Further, Posner argues that there may be an insufficient pool of legally competent, ideologically diverse justices. There would then be a trade-off between the benefits from diversity and the loss of legal competence.[53]

The focus on Charter decisions has shown that the area of law appears to matter to the issue of in which quadrant the Court is located. While examinations of the general voting behaviour by the Court are

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[48] See Alarie, Green & Iacobucci, *supra*, note 30, for an initial discussion of panel sizes.

[49] Posner, *supra*, note 11.

[50] Peter Hogg, "Appointment of Justice Marshall Rothstein to the SCC" (2006) 44 Osgoode Hall L.J. 527.

[51] Posner, *supra*, note 11.

[52] *Id.*

[53] *Id.*

necessary and interesting, there is more to be gleaned by breaking down the voting into types of appeals. Yet in this analysis even the category of Charter appeals proved to be too large. The real wedges in terms of ideology and cooperation did not appear until equality appeals were examined. The current appointment process may provide the Prime Minister with the ability to appoint justices who, while on most issues are rather neutral, steer the Court in a particular direction in a narrow class of issues.

Moreover, the appointments will have different implications in different areas. To the extent that justices are clustered in their views on an issue, the addition of a justice, even extreme, to the left or right of that cluster is likely to have little influence on the identity of the median voter — that is, the voter whose vote is pivotal to gaining a majority. However, on the more clearly divided issues, the influence of a more extreme justice may be similar to that in the U.S. — the identity of the leavers and joiners on the Court becomes important in a range of important social issues.[54] Replacing a left-leaning justice with a right-leaning justice can make a considerable difference. It is the received wisdom in the U.S. that Republican Presidents attempt to add justices to the right of the median justice, and Democratic Presidents attempt to add justices to the left of the median.[55] The appointment of an ideological justice with more extreme views could therefore lead to changes in particular areas of law where there is a significant difference in ideological views. In Canada, this difference could be hidden within the apparent more overall agreement. If so, a Prime Minister may be able to change the voting in a particular area, but this may not be reflected in the more global measures of how justices vote. It may also have multiplying effects as the justices have discretion to choose a large percentage of the appeals they hear and

[54] This importance assumes that a justice's voting is stable or predictable over time or, at very least, in the short run. See, *e.g.*, Lee Epstein, Valerie Hoekstra, Jeffrey A. Segal & Harold J. Spaeth, "Do Political Preferences Change?: A Longitudinal Study of U.S. Supreme Court Justices" (1998) 60 Journal of Politics 801 [hereinafter "Epstein, Hoekstra, Segal & Spaeth"] and Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, "Ideological Drift Among Supreme Court Justices: Who, When and How Important?" (2007) 101 Nw. U.L. Rev. 1483. There has been no clear pattern of change in voting patterns by justices over time on the Supreme Court of Canada. See Alarie & Green, "Policy Preference Change", *supra*, note 1. The implications of changes, however, will depend on the initial starting points. Even if justices' votes may change in either direction (more liberal or more conservative), if the change is relatively small it may not make a difference in the ultimate outcome on a heavily split court if the change occurs in the justices at either extreme. It will be the shifts in the justices towards the middle that will matter most.

[55] For a discussion of appointments and changing attitudes, see Epstein, Hoekstra, Segal & Spaeth, *id*.

ideology has the potential to play a role in which appeals come before the Court.

The power to appoint justices may therefore not appear on its face to have produced swings in the Court or even an overtly politicized Court in the post-Charter era. However, more work is needed on specific areas of law to make that claim. It may be that appointing an ideologically disinterested court is impossible, and that ideological interests will merely depend on the composition of the appointing committee. It is even arguable that it is not, as noted above, desirable to have an ideologically disinterested Court (a catamaran is, after all, more stable than a kayak). A more transparent process may, however, impose more discipline on the ability of future Prime Ministers to use the appointments power to steer the Court on particular issues, if not on all issues.

## APPENDIX A

| **Style of Cause** | **Citation** | **Decision** | **s. 15** | **Criminal** | **By the Court?** |
|---|---|---|---|---|---|
| *Arsenault-Cameron v. Prince Edward Island* | [2000] S.C.J. No. 17, 2000 SCC 1 | liberal | - | - | - |
| *Granovsky v. Canada (Minister of Employment and Immigration)* | [2000] S.C.J. No. 29, 2000 SCC 28 | conservative | yes | - | - |
| *Lovelace v. Ontario* | [2000] S.C.J. No. 36, 2000 SCC 37 | conservative | yes | - | - |
| *R. v. Morrisey* | [2000] S.C.J. No. 39, 2000 SCC 39 | conservative | - | yes | - |
| *Blencoe v. British Columbia (Human Rights Commission)* | [2000] S.C.J. No. 43, 2000 SCC 44 | conservative | - | - | - |
| *R. v. Darrach* | [2000] S.C.J. No. 46, 2000 SCC 46 | conservative | - | yes | - |
| *Winnipeg Child and Family Services v. W. (K.L.)* | [2000] S.C.J. No. 48, 2000 SCC 48 | conservative | - | - | - |
| *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* | [2000] S.C.J. No. 66, 2000 SCC 69 | conservative | yes | - | - |
| *R. v. Latimer* | [2001] S.C.J. No. 1, 2001 SCC 1 | conservative | - | yes | yes |
| *R. v. Sharpe* | [2001] S.C.J. No. 3, 2001 SCC 2 | conservative | - | yes | - |
| *United States v. Burns* | [2001] S.C.J. No. 8, 2001 SCC 7 | liberal | - | yes | yes |
| *U S A v. Kwok* | [2001] S.C.J. No. 19, 2001 SCC 18 | conservative | - | yes | - |

| Style of Cause | Citation | Decision | s. 15 | Criminal | By the Court? |
|---|---|---|---|---|---|
| *U S A v. Cobb* | [2001] S.C.J. No. 20, 2001 SCC 19 | liberal | - | yes | - |
| *U S A v. Tsioubris* | [2001] S.C.J. No. 21, 2001 SCC 20 | liberal | - | yes | - |
| *U S A v. Shulman* | [2001] S.C.J. No. 18, 2001 SCC 21 | liberal | - | yes | - |
| *R. v. Ruzic* | [2001] S.C.J. No. 25, 2001 SCC 24 | liberal | - | yes | - |
| *R. v. Dutra* | [2001] S.C.J. No. 30, 2001 SCC 29 | conservative | - | yes | - |
| *R. v. Advance Cutting & Coring Ltd.* | [2001] S.C.J. No. 68, 2001 SCC 70 | liberal | - | yes | - |
| *R. v. 974649 Ontario Inc.* | [2001] S.C.J. No. 79, 2001 SCC 81 | conservative | - | - | - |
| *R. v. Hynes* | [2001] S.C.J. No. 80, 2001 SCC 82 | conservative | - | yes | - |
| *R. v. Golden* | [2001] S.C.J. No. 81, 2001 SCC 83 | liberal | - | yes | - |
| *Smith v. Canada (Attorney General)* | [2001] S.C.J. No. 85, 2001 SCC 88 | conservative | - | - | yes |
| *Dunmore v. Ontario (Attorney General)* | [2001] S.C.J. No. 87, 2001 SCC 94 | liberal | yes | - | - |
| *Suresh v. Canada (Minister of Citizenship and Immigration)* | [2002] S.C.J. No. 3, 2002 SCC 1 | liberal | - | - | yes |
| *Ahani v. Canada (Minister of Citizenship and Immigration)* | [2002] S.C.J. No. 4, 2002 SCC 2 | conservative | - | - | yes |
| *R.W.D.S.U. Local 558 v. Pepsi-Cola Canada* | [2002] S.C.J. No. 7, 2002 SCC 8 | liberal | - | - | - |
| *R. v. Law* | [2002] S.C.J. No. 10, 2002 SCC 10 | conservative | - | yes | - |
| *Mackin v. New Brunswick; Rice v. New Brunswick* | [2002] S.C.J. No. 13, 2002 SCC 13 | liberal | - | - | - |
| *R. v. Guignard* | [2002] S.C.J. No. 16, 2002 SCC 14 | liberal | - | yes | - |
| *Lavoie v. Canada* | [2002] S.C.J. No. 24, 2002 SCC 23 | conservative | yes | - | - |
| *Lavallee, Rackel & Heintz v. Canada (Attorney General); R. v. Fink* | [2002] S.C.J. No. 61, 2002 SCC 61 | liberal | - | yes | - |
| *R. v. Hall* | [2002] S.C.J. No. 65, 2002 SCC 64 | conservative | - | yes | - |
| *Sauvé v. Canada (Chief Electoral Officer)* | [2002] S.C.J. No. 66, 2002 SCC 68 | liberal | yes | - | - |
| *Quebec (Attorney General) v. Laroche* | [2002] S.C.J. No. 74, 2002 SCC 72 | conservative | - | yes | - |

| Style of Cause | Citation | Decision | s. 15 | Criminal | By the Court? |
|---|---|---|---|---|---|
| *R. v. Jarvis* | [2002] S.C.J. No. 76, 2002 SCC 73 | conservative | - | yes | - |
| *R. v. Ling* | [2002] S.C.J. No. 75, 2002 SCC 74 | conservative | - | yes | - |
| *Ruby v. Canada (Solicitor General)* | [2002] S.C.J. No. 73, 2002 SCC 75 | liberal | - | - | - |
| *Nova Scotia (Attorney General) v. Walsh* | [2002] S.C.J. No. 84, 2002 SCC 83 | conservative | yes | - | - |
| *Gosselin v. Quebec (Attorney General)* | [2002] S.C.J. No. 85, 2002 SCC 84 | conservative | yes | - | - |
| *Siemens v. Manitoba (Attorney General)* | [2003] S.C.J. No. 69, 2003 SCC 3 | liberal | yes | - | - |
| *R. v. A. (P.)* | [2003] S.C.J. No. 19, 2003 SCC 21 | conservative | - | yes | - |
| *R. v. Buhay* | [2003] S.C.J. No. 30, 2003 SCC 30 | liberal | - | yes | - |
| *Trociuk v. British Columbia (Attorney General)* | [2003] S.C.J. No. 32, 2003 SCC 34 | liberal | yes | - | - |
| *Ell v. Alberta* | [2003] S.C.J. No. 35, 2003 SCC 35 | conservative | - | - | - |
| *Figueroa v. Canada (Attorney General)* | [2003] S.C.J. No. 37, 2003 SCC 37 | liberal | - | - | - |
| *Nova Scotia v. Martin; Nova Scotia v. Laseur* | [2003] S.C.J. No. 54, 2003 SCC 54 | liberal | yes | - | - |
| *R. v. B. (S.A.)* | [2003] S.C.J. No. 61, 2003 SCC 60 | conservative | - | yes | - |
| *Doucet-Boudreau v. Nova Scotia* | [2003] S.C.J. No. 63, 2003 SCC 62 | liberal | - | - | - |
| *Vann Niagara Ltd. v. Oakville (Town)* | [2003] S.C.J. No. 71, 2003 SCC 65 | liberal | - | - | - |
| *Maranda v. Richer* | [2003] S.C.J. No. 69, 2003 SCC 67 | liberal | - | yes | - |
| *R. v. Malmo-Levine; R. v. Caine* | [2003] S.C.J. No. 79, 2003 SCC 74 | conservative | - | yes | - |
| *R. v. Clay* | [2003] S.C.J. No. 80, 2003 SCC 75 | conservative | - | yes | - |
| *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* | [2004] S.C.J. No. 6, 2004 SCC 4 | conservative | yes | - | - |
| *Harper v. Canada (Attorney General)* | [2004] S.C.J. No. 28, 2004 SCC 33 | conservative | - | - | - |
| *Application under s. 83.28 of the Criminal Code (Re)* | [2004] S.C.J. No. 40, 2004 SCC 42 | conservative | - | yes | - |

| Style of Cause | Citation | Decision | s. 15 | Criminal | By the Court? |
|---|---|---|---|---|---|
| *R. v. Demers* | [2004] S.C.J. No. 43, 2004 SCC 46 | liberal | yes | yes | - |
| *Syndicat Northcrest v. Amselem* | [2004] S.C.J. No. 46, 2004 SCC 47 | liberal | - | - | - |
| *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)* | [2004] S.C.J. No. 45, 2004 SCC 48 | liberal | - | - | - |
| *R. v. Mann* | [2004] S.C.J. No. 49, 2004 SCC 52 | liberal | - | yes | - |
| *Hodge v. Canada* | [2004] S.C.J. No. 60, 2004 SCC 65 | conservative | yes | - | - |
| *Newfoundland (Treasury Board) v. N.A.P.E.* | [2004] S.C.J. No. 61, 2004 SCC 66 | conservative | yes | - | - |
| *R. v. Tessling* | [2004] S.C.J. No. 63, 2004 SCC 67 | conservative | - | yes | - |
| *Auton v. British Columbia (Attorney General)* | [2004] S.C.J. No. 71, 2004 SCC 78 | conservative | yes | - | - |
| *Reference re Same-Sex Marriage* | [2004] S.C.J. No. 75, 2004 SCC 79 | liberal | yes | - | yes |
| *Martineau v. Canada (Minister of National Revenue)* | [2004] S.C.J. No. 58, 2004 SCC 81 | conservative | - | - | - |
| *R. v. Decorte* | [2004] S.C.J. No. 77, 2005 SCC 9 | conservative | - | yes | - |
| *UL Canada Inc. v. Quebec (Attorney General)* | [2005] S.C.J. No. 11, 2005 SCC 10 | liberal | - | - | - |
| *Solski (Tutor of) v. Quebec (Attorney General)* | [2005] S.C.J. No. 14, 2005 SCC 14 | liberal | - | - | yes |
| *Gosselin (Tutor of) v. Quebec (Attorney General)* | [2005] S.C.J. No. 15, 2005 SCC 15 | conservative | yes | - | yes |
| *R. v. Chow* | [2005] S.C.J. No. 22, 2005 SCC 24 | conservative | - | yes | - |
| *Chaoulli v. Quebec (Attorney General)* | [2005] S.C.J. No. 33, 2005 SCC 35 | liberal | - | - | - |
| *R. v. Orbanski; R. v. Elias* | [2005] S.C.J. No. 37, 2005 SCC 37 | conservative | - | yes | - |
| *Toronto Star Newspapers Ltd. v. Ontario* | [2005] S.C.J. No. 41, 2005 SCC 41 | conservative | - | - | - |
| *Medovarski v. Canada; Esteban v. Canada* | [2005] S.C.J. No. 31, 2005 SCC 51 | conservative | - | yes | - |
| *Montréal (City) v. 2952-1366 Québec Inc.* | [2005] S.C.J. No. 63, 2005 SCC 62 | liberal | - | yes | - |
| *R. v. Pires; R. v. Lising* | [2005] S.C.J. No. 67, 2005 SCC 66 | conservative | - | yes | - |

| Style of Cause | Citation | Decision | s. 15 | Criminal | By the Court? |
|---|---|---|---|---|---|
| *R. v. Henry* | [2005] S.C.J. No. 76, 2005 SCC 76 | conservative | - | yes | - |
| *R. v. Wiles* | [2005] S.C.J. No. 53, 2005 SCC 84 | conservative | - | yes | - |
| *Multani v. Commission scolaire Marguerite-Bourgeoys* | [2006] S.C.J. No. 6, 2006 SCC 6 | liberal | yes | - | - |
| *R. v. Chaisson* | [2006] S.C.J. No. 11, 2006 SCC 11 | liberal | - | yes | - |
| *R. v. Rodgers* | [2006] S.C.J. No. 15, 2006 SCC 15 | conservative | - | yes | - |
| *U S A v. Ferras; U S A v. Latty* | [2006] S.C.J. No. 33, 2006 SCC 33 | conservative | - | yes | - |
| *United Mexican States v. Ortega; U S A v. Fiessel* | [2006] S.C.J. No. 34, 2006 SCC 34 | liberal | - | yes | - |
| *R. v. Krieger* | [2006] S.C.J. No. 47, 2006 SCC 47 | liberal | - | yes | - |
| *Charkaoui v. Canada (Citizenship and Immigration)* | [2007] S.C.J. No. 9, 2007 SCC 9 | liberal | yes | yes | - |
| *Canada (Attorney General) v. Hislop* | [2007] S.C.J. No. 10, 2007 SCC 10 | liberal | yes | - | - |
| *R. v. Bryan* | [2007] S.C.J. No. 12, 2007 SCC 12 | conservative | - | - | - |
| *R. v. Hape* | [2007] S.C.J. No. 26, 2007 SCC 26 | conservative | - | yes | - |
| *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia* | [2007] S.C.J. No. 27, 2007 SCC 27 | liberal | yes | - | - |
| *Canada (Attorney General) v. JTI-Macdonald Corp.* | [2007] S.C.J. No. 30, 2007 SCC 30 | liberal | - | - | - |
| *Baier v. Alberta* | [2007] S.C.J. No. 31, 2007 SCC 31 | conservative | yes | - | - |
| *R. v. Clayton* | [2007] S.C.J. No. 32, 2007 SCC 32 | conservative | - | yes | - |
| *R. v. Singh* | [2007] S.C.J. No. 48, 2007 SCC 48 | conservative | - | yes | - |
| *R. v. Ferguson* | [2008] S.C.J. No. 6, 2008 SCC 6 | conservative | - | yes | - |
| *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada* | [2008] S.C.J. No. 15, 2008 SCC 15 | liberal | - | - | - |
| *R. v. Kang-Brown* | [2008] S.C.J. No. 18, 2008 SCC 18 | liberal | - | yes | - |
| *R. v. M. (A.)* | [2008] S.C.J. No. 19, 2008 SCC 19 | conservative | - | yes | - |

| Style of Cause | Citation | Decision | s. 15 | Criminal | By the Court? |
|---|---|---|---|---|---|
| *Lake v. Canada (Minister of Justice)* | [2008] S.C.J. No. 23, 2008 SCC 23 | conservative | - | yes | - |
| *R. v. B. (D.)* | [2008] S.C.J. No. 25, 2008 SCC 25 | liberal | - | yes | - |
| *Canada (Justice) v. Khadr* | [2008] S.C.J. No. 28, 2008 SCC 28 | liberal | - | yes | yes |
| *R. v. Wittwer* | [2008] S.C.J. No. 33, 2008 SCC 33 | liberal | - | yes | - |
| *Charkaoui v. Canada (Citizenship and Immigration)* | [2008] S.C.J. No. 38, 2008 SCC 38 | liberal | - | yes | - |
| *R. v. Kapp* | [2008] S.C.J. No. 42, 2008 SCC 41 | conservative | yes | yes | - |
| *Desrochers v. Canada (Industry)* | [2009] S.C.J. No. 8, 2009 SCC 8 | conservative | - | - | - |
| *Ermineskin Indian Band and Nation v. Canada* | [2009] S.C.J. No. 9, 2009 SCC 9 | conservative | yes | - | - |