

Strategic Behaviour and Leadership Patterns of Modern Chief Justices

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Abstract

This study uses strategic behaviour, leadership change, and feminist theories to examine patterns of judicial activity by the three post-Charter chief justices of the Supreme Court of Canada. Building on prior scholarship, we use various methods to examine patterns of majority voting, dissenting activity, opinion writing, ideological voting, and panel size across the 1973 to 2014 period. While Chief Justices Lamer and Dickson exhibited clear patterns of task leadership, we find strong evidence of strategic change by Chief Justice McLachlin following her elevation to chief. She moved from a prolific dissenter as a puisne justice to a chief who exhibited behaviour of both a task leader and a social leader, which scholars see as highly uncommon. Her efforts to solidify her central role as a collegial leader within her own court, which took place during a period of increasing panel sizes and a shrinking court docket, are remarkable.

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C.L. OSTBERG AND MATTHEW E. WETSTEIN*

This study uses strategic behaviour, leadership change, and feminist theories to examine patterns of judicial activity by the three post-*Charter* chief justices of the Supreme Court of Canada. Building on prior scholarship, we use various methods to examine patterns of majority voting, dissenting activity, opinion writing, ideological voting, and panel size across the 1973 to 2014 period. While Chief Justices Lamer and Dickson exhibited clear patterns of task leadership, we find strong evidence of strategic change by Chief Justice McLachlin following her elevation to chief. She moved from a prolific dissenter as a puisne justice to a chief who exhibited behaviour of both a task leader and a social leader, which scholars see as highly uncommon. Her efforts to solidify her central role as a collegial leader within her own court, which took place during a period of increasing panel sizes and a shrinking court docket, are remarkable.

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AS WE REFLECT ON THE LAST YEAR of Chief Justice Beverley McLachlin's tenure at the helm of the Supreme Court of Canada ("SCC"), it makes intuitive sense to look back on her career as chief justice to examine her leadership and explore in greater depth how it compares to her two predecessors in the post-*Charter* era. We focus on the post-*Charter* era because it serves as a distinctive break point in the history of the Court's rulings. Since all three of the post-*Charter* chiefs also served as puisne justices on the Court for almost ten years before ascending to the helm, we should also explore whether they dramatically changed their respective behaviours on the bench once they acquired their new mantles of responsibility. These inquiries become more salient given the decisive policy-making role the Court has come to play in Canada's political arena over the past 30 years, a role that has drawn much attention and media scrutiny to the chief justice and the Court. We, like prior judicial scholars, rely on rational choice theory and the literature on judicial leadership to help guide the theoretical foundations of our inquiry. However, we add new insights derived from feminist theories of gender differences to guide our analysis. Ultimately, this study explores whether the three post-*Charter* chief justices became more strategic in their majority voting behaviours, opinion writing, choices of panel size, and ideological position taking once they assumed the helms of their courts. Building on prior research, this study explores in greater detail how leadership styles differed from chief to chief during critical post-*Charter* years, helping us tease out whether any of the modern chief justices have engaged in strong patterns of rational choice or strategic behaviour to shape the direction of their courts, and whether Chief Justice McLachlin's behaviour might align with the literature on a distinctive feminine voice.

A study of this kind is important for numerous reasons. First, it provides a more robust understanding of an institution that has come to play a dominant role in Canadian politics in the post-*Charter* era. Second, an examination of the differences between the roles taken by the first three post-*Charter* chief justices may provide greater insight into leadership activity and possible gender differences of future judicial elites. Third, assessing the impact of how panels are struck has important theoretical implications for understanding strategic behaviour on the Court as well as practical implications for other democratic societies considering implementing similar institutional features. Fourth, examining possible behavioural differences that occur after the transition from puisne justice to chief justice enhances our theoretical understanding of strategic and leadership behaviour and its contribution to leading social science theories.

I. REVIEW OF EXISTING LITERATURE

One of the salient social science paradigms used for studying political behaviour and group dynamics is rational choice theory. The gist of this theory is that political actors will pursue their policy preferences in most situations, but in small-group settings they will sometimes augment their behaviour in order to avoid an undesirable policy outcome.¹ Since appellate courts are comprised of small groups of justices who must interact with each other on a daily basis to hand down rulings, judicial scholars use rational choice theory to help explain judicial voting behaviour. Strategic scholars of judicial behaviour agree with attitudinal theorists that a justice's overarching goal is to seek his or her own policy preferences enacted into law, yet since high court justices are not unconstrained unilateral actors and cannot make binding law by themselves, they must take into consideration the preferences of other actors in the system in the course of pursuing their own policy goals.² This research documents that justices in the United States engage in a myriad of strategic behaviours at all stages of the judicial process, from the selection of cases through opinion writing, in order to reach their most preferred positions. For example, since it takes five to forge a winning coalition on a court of nine justices, members often suppress their own preferred position when taking into consideration the expectations and preferences of others in order to avoid a worse case outcome. These scholars also document that strategic justices are forward-thinking actors who, when facing policy choices, take into consideration the expectations of outside governmental officials in a system of shared powers and dominant majoritarian beliefs. Scholarship on the post-*Charter* SCC highlights this type of inter-institutional strategic behaviour by documenting an ongoing strategic dialogue with Parliament and other institutional actors over

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1. Kenneth J Arrow, *Social Choice and Individual Values*, 3rd ed (New Haven: Yale University Press, 2012); Peter C Ordeshook, *Game Theory and Political Theory* (Cambridge: Cambridge University Press, 1986).
 2. Lee Epstein & Jack Knight, *The Choices Justices Make* (Washington, DC: CQ Press, 1998) at 11-12; Forrest Maltzmann, James F Spriggs II & Paul J Wahlbeck, *Crafting Law on the Supreme Court: The Collegial Game* (Cambridge: Cambridge University Press, 2000) at 17-18.

the machinations and meanings of key *Charter* principles.³ Other scholarship, in turn, has documented the strategic and political calculations that Canadian justices make when deciding which cases to take on appeal.⁴ Collectively, these scholars have shown that both US and Canadian justices act in a sophisticated strategic manner by continually negotiating the expectations and responses of other actors in the system when grappling with individual cases in an effort to negotiate their most preferred policy positions.

Research demonstrates that leadership roles have a profound impact on judicial behaviour on the Supreme Court of the United States.⁵ Pioneering

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3. For commentary on the *Charter* dialogue, see Peter W Hogg & Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)" (1997) 35:1 Osgoode Hall LJ 75; Peter W Hogg & Allison A Thornton, "Reply to 'Six Degrees of Dialogue'" (1999) 37:3 Osgoode Hall LJ 529; Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg & Bushell" (1999) 37:3 Osgoode Hall LJ 513; Christopher P Manfredi & James B Kelly, "Dialogue, Deference, and Restraint: Judicial Independence and Trial Procedures" (2001) 64:2 Sask L Rev 323; Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, revised ed (Toronto: Irwin Law, 2016); Janet L Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002); Matthew A Hennigar, "Expanding the 'Dialogue' Debate: Canadian Federal Government Responses to Lower Court Charter Decisions" (2004) 37:1 Can J Pol Sci 3; Matthew A Hennigar, "The Canadian Government's Litigation Strategy in Sexual Orientation Cases" (Paper delivered at the Canadian Political Science Association's 76th Annual Meeting, 4 June 2004), online: <www.cpsa-acsp.ca/papers-2004/Hennigar.pdf>; Peter W Hogg, Allison A Bushell Thornton & Wade K Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45:1 Osgoode Hall LJ 1 (published in a Special Issue of the Osgoode Hall Law Journal entitled "Charter Dialogue: Ten Years Later").
 4. See e.g. Roy B Flemming, *Tournament of Appeals: Granting Judicial Review in Canada* (Vancouver: UBC Press, 2004); Roy B Flemming & Glen S Krutz, "Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses" (2004) 64:1 J Politics 232.
 5. See David J Danelski, "An Exploratory Study of Opinion Assignment by the Chief Justice Revisited" in David J Danelski & Artemus Ward, eds, *The Chief Justice: Appointment & Influence* (Ann Arbor, Mich: University of Michigan Press, 2016) 47 [Danelski, "Opinion Assignment"]; David J Danelski, "The Earliest Social Science Studies of the Chief Justice Revisited" in Danelski & Ward, *ibid*, 13 [Danelski, "Social Science"]; Charles M Cameron & Tom Clark, "The Chief Justice and Procedural Power" in Danelski & Ward, *ibid*, 202; David J Danelski, *The Chief Justice and the Supreme Court* (PhD Dissertation, University of Chicago, 1961) [unpublished]; David J Danelski, "Conflict and Its Resolution in the Supreme Court" (1967) 11:1 J Confl Resolution 71 [Danelski, "Conflict and Resolution"]; David J Danelski & Jeanne C Danelski, "Leadership in the Warren Court" in Sheldon Goldman & Austin Sarat, eds, *American Court Systems: Readings in Judicial Process and Behavior* (New York: Longman, 1989) 500; David J Danelski, "The Influence of the Chief Justice in the Decisional Process of the Supreme Court" in Goldman & Sarat, *ibid*, 19 [Danelski,

work by David Danelski relied on social psychological research of small-group behaviour to develop two theoretical archetypes for explaining leadership on the US Supreme Court.⁶ He argues that, for a court to work effectively in deciding cases and maintaining a congenial environment, a “task leader” and a “social leader” must emerge to guide the decision-making process, although both roles may be assumed by the same justice.⁷ According to Danelski, a task leader is the intellectual powerhouse of the court, whose technical competence, analytical ability, and intensity and force of argument allow him or her to sway other colleagues to his or her stance in a given case.⁸ In complex cases, colleagues often rely on the task leader for intellectual guidance. The task leader is a highly skilled legal orator and writer who often drives the resolution of cases without taking into consideration the feelings of others.⁹ As such, task leaders, in theory, write more majority opinions than their peers. Danelski argues the social leader, on the other hand, works to foster collegiality, smooth ruffled feathers, and bolster the esteem of others in an institutional environment that encourages conflict over core value positions in salient cases.¹⁰ The social leader’s aim is to ensure that everyone feels valued and to foster favourable social interactions so the court can work most effectively as a unit on a daily basis. The social leader is the best-liked member of a court because he or she empowers colleagues by telling jokes, encouraging others, avoiding conflict, restoring the peace through negotiation and bargaining, and providing passive acceptance of other colleagues’ views.¹¹ Implicitly, social leaders are harder to identify through case outcomes, but their supportive, collegial nature is theoretically found in joining majority coalitions more frequently than their peers, and in dissenting less often.

Subsequent scholars have built on Danelski’s groundbreaking work to explore in greater depth the interrelationship between leadership activity and

“Influence”]; Walter F Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); Robert J Steamer, *Chief Justice: Leadership and the Supreme Court* (Columbia, SC: University of South Carolina Press, 1986); Thomas G Walker, Lee Epstein & William J Dixon, “On the Mysterious Demise of Consensual Norms in the United States Supreme Court” (1988) 50:2 J Politics 361; Stacia L Haynie, “Leadership and Consensus on the U.S. Supreme Court” (1992) 54:4 J Politics 1158; Saul Brenner & Timothy M Hagle, “Opinion Writing and Acclimation Effect” (1996) 18:3 Political Behav 235.

6. Danelski, “Conflict and Resolution,” *supra* note 5 at 79-82.

7. *Ibid* at 81.

8. *Ibid* at 79-81.

9. *Ibid* at 80.

10. *Ibid* at 81-82.

11. *Ibid*. See also Danelski, “Influence,” *supra* note 5 at 24-26.

judicial behaviour within and across different US courts.¹² We believe that social leaders have become equated with concerns about court solidarity and the overall satisfaction of justices in expressing their views and being heard, while task leaders have become associated with concerns about the overall intellectual prominence, stability, and direction of a court.

Danelski's theoretical constructs for explaining leadership roles on the US Supreme Court dovetail nicely with certain feminist scholarship exploring distinctive gender differences in leadership styles between top-level policymakers. It makes sense to explore the impact of gender differences near the end of the first female chief justice's career. Scholars in this field have often relied on two strands of feminist theory grounded in concepts from sociolinguistics and psychology to guide their analysis. Pioneering work by psychologist Carol Gilligan maintains that men view the world in a more linear, hierarchical, and individualistic manner, and thus are likely to resolve conflicts according to abstract rules incorporated in the language of absolute rights applied in a zero-sum, all-or-nothing fashion.¹³ Women, on the other hand, tend to see the world as a web of relationships contained in a larger interdependent community and thus resolve conflict in a more conciliatory fashion utilizing the language of reconciliation and responsibility to society.¹⁴ Deborah Tannen's work in the area of sociolinguistics reinforces Gilligan's contention, suggesting that women's communication styles in a wide variety of settings are aimed at solidifying relationships, providing support for others, and building consensus, while men often approach communication in an adversarial manner.¹⁵ Research in the field of small group dynamics in legislative settings arrives at similar conclusions about the more collegial and democratic nature of women leaders.¹⁶ The theoretical paradigm developed by these feminist scholars has become more prevalent as more women have been elected and appointed to powerful positions in government and courts. Having said this, the feminist arguments advanced above are by no means universally

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12. See *e.g.* Murphy, *supra* note 5; Steamer, *supra* note 5; Walker, Epstein & Dixon, *supra* note 5, Haynie, *supra* note 5.
 13. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass: Harvard University Press, 2003). See also Barbara Palmer, "Women in the American Judiciary: Their Influence and Impact" (2001) 23:3 *Women & Politics* 91.
 14. Gilligan, *supra* note 13.
 15. See Deborah Tannen, *You Just Don't Understand: Women and Men in Conversation* (New York: Ballantine Books, 1990) at 24-25.
 16. Lyn Kathlene, "Power and Influence in State Legislative Policymaking: The Interaction of Gender and Position in Committee Hearing Debates" (1994) 88:3 *Am Pol Sci Rev* 560 at 561, 567-69, 573-74.

accepted. A meta-analysis of more than 2000 psychological studies of the gender difference argument points out that in most circumstances, a gender similarities hypothesis has garnered more empirical justification.¹⁷ According to Janet Shibley Hyde, females and males are quite similar in their psychological patterns of behaviour across a large number of domains like cognitive performance, modes of communication, social and personality traits, and notions of psychological well-being.¹⁸ Even so, psychological studies show small to moderate gender differences in communication and leadership abilities, including a slightly greater tendency for men to interrupt in conversations, to engage in more frequent use of verbal aggression, to exhibit a slightly stronger leaning towards autocratic leadership, to be moderately more distrustful of others in groups, to be less oriented to an ethic of care for others, and to express significantly lower levels of agreeableness and tender mindedness.¹⁹ All of these domains have the potential to reflect gendered differences that might appear in the activities of justices, especially patterns of dissent and majority-joining behaviour. These conceptions of gender difference, when combined with Danelksi's constructs of leadership, provide a compelling line of inquiry especially at the end of the first female chief justice's tenure on the SCC.

There has been a host of studies aimed at assessing gender difference in the legal realm in the United States and Canada, although most of the studies have

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17. Janet Shibley Hyde, "The Gender Similarities Hypothesis" (2005) 60:6 *Am Psychol* 581 [Hyde, "Gender Hypothesis"]; Michael S Kimmel, Amy Aronson & Amy Kaler, *The Gendered Society Reader* (New York: Oxford University Press, 2011); Janet Shibley Hyde, "Gender Similarities and Differences" (2014) 65 *Ann Rev Psychol* 373 [Hyde, "Gender Differences"].
 18. Hyde, "Gender Hypothesis," *supra* note 17 at 583-86; Hyde, "Gender Differences," *supra* note 17 at 380-89.
 19. *Ibid.* See also Kristen J Anderson & Campbell Leaper, "Meta-Analyses of Gender Effects on Conversational Interruption: Who, What, When, Where, and How" (1998) 39:3&4 *Sex Roles* 225; Janet Shibley Hyde, "How Large Are Gender Differences in Aggression? A Developmental Meta-Analysis" (1984) 20:4 *Developmental Psychol* 722; Janet Shibley Hyde, "Gender Differences in Aggression" in Janet Shibley Hyde & Marcia C Linn, eds, *The Psychology of Gender: Advances through Meta-analysis* (Baltimore: John Hopkins University Press, 1986) 51; George P Knight et al, "Emotional Arousal and Gender Differences in Aggression: A Meta-Analysis" (2002) 28:5 *Aggressive Behav* 366; John Archer, "Sex Differences in Aggression in Real-World Settings: A Meta-Analytic Review" (2004) 8:4 *Rev Gen Psychol* 291; Alice H Eagly & Blair T Johnson, "Gender and Leadership Style: A Meta-Analysis" (1990) 108:2 *Psychol Bull* 233; Alan Feingold, "Gender Differences in Personality: A Meta-Analysis" (1994) 116:3 *Psychol Bull* 429; Sara Jaffee & Janet Shibley Hyde, "Gender Differences in Moral Orientation: A Meta-Analysis" (2000) 126:5 *Psychol Bull* 703.

focused on lower appellate behaviour at the micro-level in specific areas of law. These studies have yielded mixed results. While some scholars suggest that no coherent generalizations can be made about the impact of women justices on lower appellate courts,²⁰ others have demonstrated that gender differences do emerge in particular types of legal disputes, such as employment discrimination.²¹ The few studies that have examined gender difference on the apex supreme courts in the two countries have also yielded mixed results.²² Comments by the

20. See *e.g.* Herbert M Kritzer & Thomas M Uhlman, "Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition" (1977) 14:2 Soc Sci J 77; John Gruhl, Cassia Spohn & Susan Welch, "Women as Policymakers: The Case of Trial Judges" (1981) 25:2 Am J Pol Sci 308; Jon Gottschall, "Carter's Judicial Appointments: The Influence of Affirmative Action and Merit Selection on Voting on the U.S. Courts of Appeals" (1983) 67:4 Judicature 165; Thomas G Walker & Deborah J Barrow, "The Diversification of the Federal Bench: Policy and Process Ramifications" (1985) 47:2 J Pol 596; Sue Davis, "President Carter's Selection Reforms and Judicial Policymaking: A Voting Analysis of the United States Courts of Appeals" (1986) 14:4 Am Pol Q 328.
21. See *e.g.* Sue Davis, Susan Haire & Donald R Songer, "Voting Behavior and Gender on the U.S. Courts of Appeals" (1993) 77:3 Judicature 129; Donald R Songer, Sue Davis & Susan Haire, "A Reappraisal of Diversification in the Federal Courts: Gender Effects in the Courts of Appeals" (1994) 56:2 J Politics 425. For evidence of other gender differences, see Gerard S Gryski, Eleanor C Main & William J Dixon, "Models of State High Court Decision Making in Sex Discrimination Cases" (1986) 48:1 J Politics 143; David W Allen & Diane E Wall, "The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?" (1987) 12:2 Just Sys J 232; Elaine Martin & Barry Pyle, "Gender, Race, and Partisanship on the Michigan Supreme Court" (2000) 63:4 Alb L Rev 1205; Donald R Songer & Kelly A Crews-Meyer, "Does Judge Gender Matter? Decision Making in State Supreme Courts" (2000) 81:3 Soc Sci Q 750; Jennifer L Peresie, "Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts" (2005) 114:7 Yale LJ 1759.
22. For U.S. studies see Suzanna Sherry, "Civic Virtue and the Feminine Voice in Constitutional Adjudication" (1986) 72:3 Va L Rev 543; Karen O'Connor & Jeffrey A Segal, "Justice Sandra Day O'Connor and the Supreme Court's Reaction to Its First Female Member" (1990) 10:2 Women & Politics 95; Susan Behuniak-Long, "Justice Sandra Day O'Connor and the Power of Maternal Legal Thinking" (1992) 54:3 Rev Politics 417; Sue Davis, "The Voice of Sandra Day O'Connor" (1993) 77:3 Judicature 134; Jilda M Aliotta, "Justice O'Connor and the Equal Protection Clause: a Feminine Voice?" (1995) 78:5 Judicature 232; Patricia A Sullivan & Steven R Goldzwig, "Abortion and Undue Burdens: Justice Sandra Day O'Connor and Judicial Decision-Making" (1996) 16:3 Women & Politics 27; Nancy Maveety, *Justice Sandra Day O'Connor: Strategist on the Supreme Court* (Lanham, Md: Rowman & Littlefield, 1996). For Canadian studies of gender difference in judicial behavior see Bertha Wilson, "Will Women Judges Really Make a Difference?" (1990) 28:3 Osgoode Hall LJ 507; Peter McCormick & Twyla Job, "Do Women Judges Make a Difference? An Analysis by Appeal Court Data" (1993) 8:1 CJLS 135 [McCormick & Job, "Women Judges"]; Candace C White, "Gender Differences on the Supreme Court" in FL Morton, ed, *Law, Politics, and the Judicial Process in Canada*, 3rd ed (Calgary: University of Calgary Press, 2002) 85; Donald R Songer & Ann Clark, "Judge Gender and Voting in Appellate Courts: A Cross National

justices themselves reveal different sentiments. Justice Sandra Day O'Connor claimed, "[t]here is simply no empirical evidence that gender differences lead to discernible differences in rendering judgments,"²³ while Justice Bertha Wilson concluded that "[t]here is merit in Gilligan's analysis."²⁴ Justice Louis LeBel, who recently served with four women on the Canadian bench, stated: "My gut feeling is that it does make a difference in a number of issues," because women have "a certain sensitivity" and a "vision that is different from men in some cases."²⁵ Given the contested viewpoints on the gender difference hypothesis, the question remains whether the leadership style and voting behaviour of the first female Canadian chief justice are demonstrably different from her two post-*Charter* male predecessors.

Female chief justices, like their male counterparts, are in an optimal position to take on either the task or social leadership role, although Danelski acknowledges that these roles can be taken on by other members of the bench.²⁶ He argues that few US chief justices have been able to effectively exercise both roles—with the exception of Chief Justices John Marshall and Charles Evan Hughes—because the task leaders tend to foster conflict and tension while the social leaders try to alleviate antagonism and integrate the bench into a more cohesive unit.²⁷ Given the institutional power of the chief justice at all stages of the judicial process, including the selection of cases, assignment of opinion writing, and service at the administrative helm of the court, the chief is in a key position to take on

and Cross Institutional Analysis" (Paper delivered at the annual meeting of the Southern Political Science Association, 2002) [unpublished]; Donald R Songer, Ann Clark & Rebecca Wood, "The Effects of Judge Gender in Appellate Courts: A Comparative Cross-National Test" (Paper presented at the annual meeting of the American Political Science Association, 30 September 2003), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1539882>; CL Ostberg & Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007) [Ostberg & Wetstein, *Attitudinal Decision Making*]; Marie-Claire Belleau & Rebecca Johnson, "Judging Gender: Difference and Dissent at the Supreme Court of Canada" (2008) 15:1&2 Intl J Leg Profession 57; Donald R Songer et al, *Law, Ideology, and Collegiality: Judicial Behaviour in the Supreme Court of Canada* (Montreal: McGill-Queen's University Press, 2012) [Songer et al, *Law, Ideology*]; Peter McCormick, "Who Writes? Gender and Judgment Assignment in the Supreme Court of Canada" (2014) 51:2 Osgoode Hall LJ 595 [McCormick, "Who Writes"].

23. Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (New York: Random House, 2003) at 191.
24. Wilson, *supra* note 22 at 520.
25. Tonda MacCharles, "Top court benefits from diversity, LeBel Says," *Toronto Star* (1 December 2014), A8 (Lexis).
26. Danelski, "Influence," *supra* note 5 at 24-25.
27. *Ibid* at 25.

either of these leadership roles during his or her tenure. Although the chief justice is often referred to as “first among equals,” this characterization is misleading because it fails to acknowledge the various advantages chief justices have at their disposal to acquire either or both the task and social leadership roles.²⁸ Recent empirical work in the United States confirms some of Danelski’s claims. For example, Charles M. Cameron and Tom Clark indicate that modern US chief justices have tended to steer “the most important cases to [their] ideological allies,” if not to themselves, and that the ideological location of the chief justice in a given case is a strong predictor of the disposition of that case, although that power is constrained by various institutional norms, expectations, and operating procedures.²⁹ For instance, chief justices must take into consideration workload balance, varying abilities of justices, operational efficiency, and judicial expertise while also considering their policy preferences.³⁰ Moreover, chief justices may moderate their own policy preferences in order to foster greater agreement and thereby strengthen court legitimacy.³¹ US chief justices, like presidents, also experience a potential honeymoon period during the first few years as chief which affords them greater opportunities to forge unanimous opinions on the court.³² Collectively, this body of work showcases both the power and limitations that promote and constrain a chief justice’s ability to lead his or her own court.

In the Canadian context, a chief justice’s ability to strike different sized panels provides a unique strategic lever that he or she can use to exert ideological control over the outcome of a case. Although some contend chief justices do not abuse this power across all cases, they do tend to select ideological allies more frequently to hear arguments in politically salient *Charter* disputes.³³ Interviews with the justices, on the other hand, have led other scholars to downplay the notion of striking ideological panels. Indeed, Ian Greene, Carl Baar, Peter

28. *Ibid.*

29. Cameron & Clark, *supra* note 5 at 221-24. See also Maltzmann, Spriggs & Wahlbeck, *supra* note 2.

30. Maltzmann, Spriggs & Wahlbeck, *supra* note 2; David J Danelski, “An Exploratory Study of Opinion Assignment by the Chief Justice Revisited” in Danelski & Ward, *supra* note 5, 47 at 48-57.

31. Maltzmann, Spriggs & Wahlbeck, *supra* note 2 at 32-56. See also Drew Noble Lanier & Sandra L Wood, “Moving on Up: Institutional Position, Politics, and the Chief Justice” (2001) 22:1 *Am Rev of Pol* 93.

32. Amy Steigerwalt, Pamela C Corley & Artemus Ward, “Honeymoon on the Court? Chief Justices and Consensus Building on the Supreme Court” in Danelski & Ward, *supra* note 5, 235 at 237.

33. Lori Hausegger & Stacia Haynie, “Judicial Decisionmaking and the Use of Panels in the Canadian Supreme Court and South African Appellate Division” (2003) 37:3 *Law & Soc’y Rev* 635 at 655.

McCormick, George Szablowski, and Martin Thomas conclude that panel and opinion assignment are shaped more by the chief's interest in seeking volunteers for opinion writing, balancing the workload, relying on justices' legal expertise, and delivering the most unified coalition.³⁴ Our research indicates that a larger panel size makes it mathematically less likely that a chief will write the majority opinion.³⁵ However, we found that chief justices do write a higher percentage of majority opinions while serving as chief and simultaneously curb their tendencies to cast dissenting votes. Recent work by Peter McCormick has confirmed the tendency by chief justices to assign more majority opinions to themselves, and particularly ones that are significant to a chief's personal politics and are likely to garner publicity. He has also confirmed a gender gap across the Dickson, Lamer, and McLachlin Courts in the assignment of fewer important opinions to female puisne justices.³⁶ These male/female differences align well with the body of scholarship on voting differences and opinion writing on appellate courts.³⁷

While earlier research in Canada has analyzed strategic leadership of the chief justices by looking at majority opinion writing, dissenting opinion writing, and dissenting voting,³⁸ it has failed to examine the change after a puisne justice's transition to chief and its effect on the SCC's mean majority position, its ideological direction over time, and its impact on average panel size in light of a decreasing docket. This study turns to these critical indicators of chief justice leadership. It also expands the scope of inquiry to include the bulk of Chief Justice McLachlin's tenure beyond an initial glimpse of her first two years. More significantly, this study has the ability, for the first time, to consider possible gender-related factors in assessing the impact of the three post-*Charter*

34. Ian Greene et al, *Final Appeal: Decision-Making in Canada's Courts of Appeal* (Toronto: James Lorimer, 1998) at 119. See also Songer et al, *Law, Ideology*, *supra* note 22 at 88; Emmett MacFarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2013) at 104-05; McCormick, "Who Writes," *supra* note 22.

35. Matthew E Wetstein & CL Ostberg, "Strategic Leadership and Political Change on the Supreme Court of Canada: Analyzing the Transition to Chief Justice" (2005) 38:3 Can J Pol Sci 653 at 663-66 [Wetstein & Ostberg, "Strategic Leadership"].

36. McCormick, "Who Writes," *supra* note 22.

37. McCormick & Job, "Women Judges," *supra* note 22; White, *supra* note 22; Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 22 at 115-154; Songer et al, *Law, Ideology*, *supra* note 22 at 132-152; Belleau & Johnson, *supra* note 22; John Szmer, Susan W Johnson & Tammy A Sarver, "Does *the Lawyer* Matter? Influencing Outcomes on the Supreme Court of Canada" (2007) 41:2 Law & Soc'y Rev 279; Erin B Kaheny, John J Szmer & Tammy A Sarver, "Women Lawyers before the Supreme Court of Canada" (2011) 44:1 Can J Pol Sci 83.

38. Wetstein & Ostberg, "Strategic Leadership," *supra* note 35.

chief justices. The analysis that follows focuses on majority voting behaviour, opinion writing, ideological voting, and panel composition across four decades (1973-2014) and three post-*Charter* chief justiceships, situating these acts of judicial behaviour within the prisms of rational choice, strategic behaviour, leadership, and feminist theories.

There are some limitations to this research that are worth noting at the onset. First, although statistical analysis of case outcomes and overall records of voting and authorship provide important insights into leadership patterns, a more complete picture of strategic interaction on the Court will emerge only after an exploration of the inner dynamics of the Court, which are typically revealed in conference notes and draft opinions. Second, our analysis treats each case as a unique and equal data point in the data set, which does not acknowledge that some cases and opinions provide more salient and important opportunities for leadership activity (*e.g.*, cases that are bound to draw media attention). We leave to another day the exploration of this type of leadership analysis. Third, we analyze all cases, including brief oral judgments and cases with lengthier written reasons for judgment. Some readers may criticize our decision to include oral judgments because they are almost always unanimous and almost always delivered by the senior justice on the panel. As such, the patterns we report here may inflate the overall patterns of agreement among the justices. Our decision to include all cases was driven by the desire to address the activities of the justices across the full panoply of cases they decide. We suspect that a subsequent study limited only to cases with written reasons for judgment may amplify the significant findings we report here. Finally, our analysis focuses on patterns of dissent authorship, dissenting votes, and majority votes, while omitting analysis of written concurring opinions. Readers might point out that separate concurrences may be just as important an expression of difference as dissents, and may carry as much substantive legal significance. Having said this, we hasten to note that concurrences are qualitatively different than dissenting opinions or dissenting votes, which reflect an opposition to the dispositive outcome of the case and whom the justice believes should win the dispute. While recognizing the significance of separate concurrences, we leave to another study to determine the prominence of leadership and joining behaviours in those formal expressions of difference with the majority author.³⁹ Despite these four limitations, we believe the empirical analysis of case outcomes and opinion writing behaviour that

39. We are grateful for the anonymous reviewers of our article for pointing out this limitation to our study.

we highlight provides a critical insight into the leadership attributes of the post-*Charter* chiefs.

II. DATA AND METHODS: ANALYZING PUBLISHED OPINIONS OF THE SUPREME COURT OF CANADA FROM 1973 TO 2014

The data for this study is drawn from all published opinions of the SCC from 1973 to 2014, which becomes the source for calculating annual tabulations of majority voting, writing of opinions, liberal decisions, and panel sizes. Liberal decisions are those that support criminal defendants in criminal cases, decisions upholding *Charter* rights, decisions supporting rights claimants, decisions that promote equality rights, decisions favouring unions and “underdogs” in economic disputes, and decisions favouring the taxing power of the government in tax cases. The 1973 to 2014 period is highlighted for analysis because it encompasses an era of significant constitutional transformation in Canada and documents a period where the Court has played an increasingly central political role in the policy process. Key data points are created each year for the three justices in our study (Chief Justices Brian Dickson, Lamer, and McLachlin), and summary scores for the rest of the justices on the bench during those years. Building on earlier work, we use a pooled cross-sectional data set featuring annual observations for Justices Dickson (1973-1990), Lamer (1980-1999) and McLachlin (1989-2014) for a total of 64 annual judge-level observations.

There are six dependent variables in the study: (1) the annual percentage of majority votes cast, (2) the annual percentage of majority opinions written, (3) the annual percentage of dissenting opinions, (4) the annual percentage of unanimous opinions, (5) the annual percentage of liberal voting choices, and (6) the annual average of case panel size. The first variable is designed to track whether justices alter their voting behaviour to join majority coalitions more frequently once they ascend to the chief justice position. As mentioned earlier, the literature on social leadership and strategic choice indicates the chief should join majority coalitions more frequently in order to control the opinion writing and influence the direction of the law.⁴⁰ If this is true, we expect the percentage of majority votes to increase after a justice becomes chief. The second, complementary variable follows the majority authorship rates before becoming chief justice (“pre-chief”) and after becoming chief justice (“post-chief”). It is expected, and past research

40. Danelski, “Opinion Assignment,” *supra* note 5.

confirms, that chiefs tend to write higher percentages of majority opinions to exert greater control over their own court.⁴¹ The third variable, assessing the annual percentage of dissenting opinions pre- and post-chief, is based on prior research which hypothesizes that chiefs will reduce their dissenting activity in order to situate themselves more frequently in the majority coalitions of their court.⁴² Although the analysis of written opinions has been featured in earlier scholarship, our study extends the opinion analysis to almost the full complement of the McLachlin Court cases (fourteen years rather than the initial two years). The last three dependent variables, like the first set, break new ground in the Canadian literature by exploring whether justices shift their ideological position within the Court once they become chief, whether unanimity rates are impacted by particular chief justices, and whether modern chief justices make strategic changes in the size of panels selected to hear cases. Research by US scholars indicates that ideological movement towards the centre of the SCOTUS makes strategic sense because it allows a chief justice to write more majority opinions, control opinion assignment, and indirectly control the content of opinions.⁴³ Additionally, if a chief is a strong social and task leader, the court should speak more frequently with a unanimous voice. The final dependent variable takes into consideration the chief's power to create panels and tests whether strategic activity has emerged in this area. One hypothesis, drawn from the strategic and attitudinal literature, would suggest that chiefs can enhance their leadership powers by selecting like-minded justices and by establishing smaller panels. A contrary hypothesis can be drawn from the literature on social leadership and interviews with the justices: These sources suggest that the workload is shared and the experience of being a justice is enhanced when panels are larger and more inclusive. Feminist theory adds a layer of complexity to this hypothesis by suggesting that, all other things being equal, a female chief justice might devote more attention to the social cohesion of the court's work than her male counterparts. In short, a female chief might be expected to include more voices in the chorus of cases heard and might devote more attention to building a consensus within those larger panels.

41. Wetstein & Ostberg, "Strategic Leadership," *supra* note 35.

42. Readers should note that we do not analyze patterns of writing separate concurrences in this study (concurrences or joining of concurrences are coded as majority/non-dissenting votes in our study). We believe it would be fruitful to examine patterns of concurrence separately to tease out how they might reflect an inability to lead the Court to a majority outcome and whether concurrence behaviour produces distinctively different regression coefficients than those found in our study for dissents and dissenting votes. This is a research project left for another day.

43. Epstein & Knight, *supra* note 2; Maltzmann, Spriggs & Wahlbeck, *supra* note 2.

Our study examines which of these hypotheses play out in the behaviour of the three post-*Charter* chief justices.

The study uses a host of independent variables and examines their relative power to explain the patterns of behaviour mentioned above. Our key independent variable is the chief versus non-chief status of the three post-*Charter* justices in our study, and is denoted each year by a dichotomous indicator (0 = non-chief, 1 = chief). As mentioned above, and in line with prior research on leadership activity, it is expected that once the three justices move to the centre chair they will exhibit greater task and social leadership and strategic behaviour by joining more majority coalitions, writing a higher percentage of majority opinions, decreasing dissenting authorship, shifting their ideological position towards the centre of the Court, and strategically using panel size power.⁴⁴ There are two additional justice-level independent variables included in the equations, namely whether Justice Dickson or Justice McLachlin is in the chief role (1 = chief, 0 = not chief) to track any distinctive leadership traits between the three post-*Charter* chief justices. Chief Justice Lamer was kept out of the equation for comparative purposes.⁴⁵ There are several other independent variables that are included in our analysis as control variables to ensure there are no rival explanations for any possible changes in the judicial behaviour examined. Since there is high turnover on the Court, and shifting ideological composition can influence a chief justice's voting behaviour and authorship activity, a measure calculating the ideological distance from the Court mean was included to assess for this possible effect.⁴⁶ The logic here is that when a chief justice is closer to

44. Our hypotheses are drawn from Danelski and McCormick. See Danelski, "Opinion Assignment," *supra* note 5; Danelski, "Conflict and Resolution," *supra* note 5; Danelski, "Influence," *supra* note 5; Danelski, "Social Science," *supra* note 5; Peter McCormick, "Career Patterns and the Delivery of Reasons for Judgment in the Supreme Court of Canada, 1949-1993" (1994) 5 SCLR (2d) 499 [McCormick, "Career Patterns"]; McCormick, "Who Writes," *supra* note 22.

45. In some instances the omitted justice is Chief Justice Dickson because the observed patterns of behaviour make him the most obvious justice to place in the comparative role.

46. See Lawrence Baum, "Measuring Policy Change in the U.S. Supreme Court" (1988) 82:3 Am Pol Sci Rev 905; Lawrence Baum, "Membership Change and Collective Voting Change in the United States Supreme Court" (1992) 54:1 J Politics 3; Lanier & Wood, *supra* note 31; Wetstein & Ostberg, "Strategic Leadership," *supra* note 35. We calculate the ideological distance by scoring judicial votes as either liberal or conservative based on the disposition of the case and parties involved. Our method follows the pioneering work of Harold Spaeth in the US setting and other Canadian Supreme Court of Canada scholars. See Songer et al, *Law, Ideology*, *supra* note 22. For the treatment of ideology in US Supreme Court cases, see Harold Spaeth, United States Supreme Court Judicial Database, 1953-1997 Terms (East Lansing, Mich: Michigan State University, 1998), online: <doi.org/10.3886/

the ideological mean of the Court as a whole in any given case, he or she is more likely to join the majority coalition and have more opportunities to write opinions. Since scholarship indicates that newly-minted chief justices write fewer majority opinions in the course of acclimating to the bench, an independent variable identifying the first two years as chief for the three justices was included to further test whether a freshmen or honeymoon effect appears (1 = first two years as chief justice, 0 = all other years as chief).⁴⁷

Four other independent variables were included in the analysis that might influence the judicial activity of the chief justice, namely the number of new justices on the bench, workload, prominence of a case, and panel size. The number of new justices elevated to the Court in a given year might increase the voting and authorship behaviour of a chief justice because scholarship has shown that chief justices tend to assign freshmen to a smaller workload to help them acclimate to the bench.⁴⁸ In such circumstances, the chief justice is more likely to strike smaller panel sizes and has more opportunity to join the majority and write majority opinions. Since a heavy workload can impact how panels are structured, and majority authorship patterns by the various justices, we included a variable that calculates the number of cases the Court heard on a yearly basis from 1973 to 2014. We hypothesized that when justices face more workload pressure and time constraints in a given year, they are more likely to join majority coalitions and write fewer dissents. Unlike in the United States, the Canadian chief justice has the power to create five-, seven-, and nine-member panels. Although scholarship assessing whether Canadian chief justices utilize this power to their advantage has yielded mixed results, it is logical to expect that larger panel sizes would generate more conflict in a given case, especially in politically high-profile cases, because the more people who are in the room, the greater likelihood for conflict to emerge.⁴⁹ This, coupled with the fact that there has been a movement towards larger panel sizes in recent decades, indicates the need to include an independent variable to control for the impact that average panel size per year has on the voting behaviours and authorship activities of the justices. Since *Charter* cases tend to constitute some of the most controversial and high-profile constitutional cases the Court has heard in the last forty years, it serves as a viable, though imperfect, measure of salient issues that come before the bench. As such, we calculated the percent of *Charter* cases heard by the Court

ICPSR09422.v9>.

47. Lanier & Wood, *supra* note 31; McCormick, "Career Patterns," *supra* note 44.

48. CL Ostberg, Matthew E Wetstein & Craig R Ducat, "Acclimation Effects on the Supreme Court of Canada: A Cross-Cultural Examination of Judicial Folklore" (2003) 84:3 Soc Sci Q 704.

49. *Ibid*; Hausegger & Haynie, *supra* note 33; Greene et al, *supra* note 34.

in a given year and hypothesize that the more *Charter* cases the Court hears, the greater likelihood that dissent will emerge. However, one could argue that in high-profile *Charter* cases, the chief justice is more likely to join the majority coalition and pen the opinion in order to control the legal direction of the Court. Thus, this variable was included to see which hypothesis played out. Collectively, these independent variables were used in ordinary least squares (OLS) regression equations to tease out possible countervailing factors beyond strategic activity that might explain judicial behaviour of the three chief justices.

III. RESULTS

A. MAJORITY AND LIBERAL VOTING PATTERNS AS PUISNE AND CHIEF JUSTICE

Table 1 provides an initial glimpse at the change in the percent majority and liberal voting behaviour of the three post-*Charter* chief justices throughout their tenure along with a calculation of their distance from the majority and liberal means of the Court. It is interesting to note that, unlike members of the US Supreme Court, all three justices exhibit a very high percentage of majority voting throughout their career, although there is a change in voting behaviour for two of the post-*Charter* chiefs. Specifically, Justices Dickson and McLachlin increased their frequency of majority votes when they transitioned to the centre chair, while Justice Lamer did not (+3.2 and +4.6 for Dickson and McLachlin respectively, versus -2.9). Only Justice McLachlin's behaviour was statistically significant, indicating that she was almost five percent more likely to vote with the majority after she became chief than when she was a puisne justice. In order to achieve this change both she and Justice Dickson changed their percent liberal voting behaviour in statistically significant ways, although in opposite directions (see column two of Table 1). While Justice Dickson decreased his liberal voting by 8.5%, Justice McLachlin increased hers by almost 9%, so they had to move in opposite directions to situate themselves in the majorities of their own courts once they became chief. Although Justice Lamer also decreased his liberal voting behaviour by 4.6%, his movement was not demonstratively different from his earlier pre-chief behaviour. One must also take into consideration the changing nature of the court composition over each chief justice's tenure before reaching any conclusions, which is a factor we control for in the third and fourth columns of the table.

The third and fourth columns of Table 1 calculate the distances of these justices from the majority and liberal means of the other justices on the Court to help shed light on their altered activities during their transitions to chief. While Justice Lamer's distance from the majority and liberal mean of the Court

did not change throughout his tenure, the same cannot be said for the other two justices. While Justice Dickson's distance from the majority mean did not change dramatically, his distance from the liberal mean of the Court went down by 7% once he became chief, which is a statistically significant change. This finding suggests that although Justice Dickson continued to vote in the majority throughout his tenure as chief, his ideological behaviour softened during his chief years, positioning him, on average, at the ideological centre of his court. In contrast, Justice McLachlin's distance from the liberal mean of the Court did not change much over her tenure, but she changed her distance from the majority mean by 6%. This means she was willing to dramatically change her dissenting behaviour to ensure that she was in the majority despite being roughly the same ideological distance from the other members of her bench during her tenure as chief as she was during her tenure as a puisne justice.

TABLE 1: PERCENT MAJORITY, LIBERAL VOTING, DISTANCE FROM MAJORITY, AND LIBERAL MEAN FOR PUISNE AND CHIEF JUSTICE DICKSON, LAMER, AND MCLACHLIN, 1973-2014

Justice	Percent Majority Voting	Percent Liberal Mean	Distance from Majority Mean	Distance from Liberal Mean
Justice Dickson				
Puisne	91.9	52.9	+0.4	+7.1
Chief	95.2	44.4	+1.8	0.0
Difference	+3.2	-8.5	+1.4	-7.1
F Test	2.3	10.0**	0.6	9.8 **
Justice Lamer				
Puisne	94.4	47.5	-0.1	+2.4
Chief	91.5	42.9	-0.4	+3.7
Difference	-2.9	-4.6	-0.3	+1.3
F Test	1.5	1.4	0.0	0.2
Justice McLachlin				
Puisne	89.4	39.4	-2.9	-0.5
Chief	94.0	48.3	+3.0	+1.5
Difference	+4.6	+8.9	+5.9	+2.0
F Test	10.1 **	7.7 **	24.4 ***	0.8

** significant at the 99% confidence level

*** significant at the 99.9% level

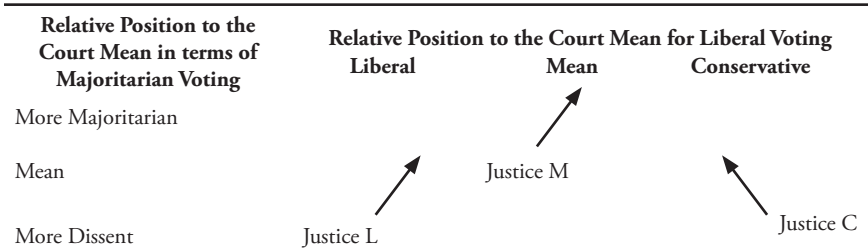
These initial differences between Justice Dickson and Justice McLachlin's activity point to a potentially compelling distinction between the two chief justices. On first impression, Justice McLachlin exhibited extreme social leadership behaviour once she became chief by voting in the majority more often, suppressing her prior prolific dissenting activity, and voting slightly more liberally to exert more control over her own court. Having said this, her ideological stance relative to other justices did not change dramatically. Justice Dickson, in turn, seized his opportunity to be a task leader, because he moved in a conservative direction in order to preside in the majority coalition once he became chief. Justice Lamer, on the other hand, did not change his behaviour once he became chief, suggesting that he did not take on the social leadership role that appears to be so coveted by Justice McLachlin. His voting patterns, at first blush, display the trappings of a justice uninterested in fostering greater degrees of social cohesion and instead reflect the habits of a justice who liked to state his mind both pre- and post-chief.

B. A TYPOLOGY OF IDEOLOGICAL AND STRATEGIC CHANGE IN THE TRANSITION TO CHIEF JUSTICE

The results featured in the third and fourth columns of Table 1 provide the seeds for a typology of strategic change for justices moving from puisne to chief justice status, especially since the data pays attention to relative positioning within a court on two metrics: (1) ideological distance from the centre of the Court, and (2) distance from the mean level of majoritarian voting. The two indicators can correlate with each other, but they need not do so across all justices. However, what we would expect in terms of leadership and strategic theory is a conscious choice and specific movement within a two-dimensional space if justices respond to their new leadership role. Put simply, chief justices should move towards the ideological middle of the court if they desire to participate in more majority-writing behaviour, which implies that they will increase their majoritarian voting patterns and likely seek to exceed the court average. Figure 1 sketches out this hypothesized relationship for three hypothetical justices: a conservative-leaning justice, a moderate, and a liberal. Seen in this light, a conservative justice should move towards the moderate middle and seek to join majority coalitions more often (moving up and to the left in our graph in Figure 1). Similarly, a strategic liberal should move up and to the right, while moderates should just move up (increasing their majority voting). Our typology can be tested by plotting the justice's scores, pre- and post-chief, in terms of ideological

distance from the mean and distance from the mean levels of majority voting behaviour (see Figure 2).

FIGURE 1: A TYPOLOGY OF STRATEGIC BEHAVIOUR IN THE TRANSITION FROM PUISNE TO CHIEF JUSTICE: MAJORITARIAN AND IDEOLOGICAL STRATEGIC RESPONSE



NOTES:

Justice C is a conservative justice who writes more dissents than average. Strategic response theory suggests that Justice C's elevation to the chief position would result in fewer dissents, more majority votes (above the mean), and a curbing of ideological extremism (movement toward the centre).

Justice L is a liberal justice who writes more dissents than average. Strategic response theory suggests that his or her elevation to the chief position would result in fewer dissents, more majority votes (above the mean), and a curbing of ideological extremism (movement toward the centre).

Justice M is a relative moderate who is slightly above average in majority voting behaviour, and slightly more conservative than the mean. Strategic response theory suggests that Justice M's elevation to the chief position would result in even more majority votes (above the mean), and perhaps a slight curbing of ideological extremism (further movement toward the centre). Justice M might exhibit the most ideological voting fluidity in order to control the court more often (*i.e.*, moving left and right to establish minimum winning coalitions).

The significance of Figure 2 lies in two key findings. Readers can first think of the six graphs as pre- and post-chief plots of ideological and majoritarian voting behaviour.

FIGURE 2: JUSTICE LIBERALISM AND MAJORITARIAN VOTING BEHAVIOUR RELATIVE TO THE COURT MEAN, PRE- AND POST-CHIEF STATUS, 1973-2014

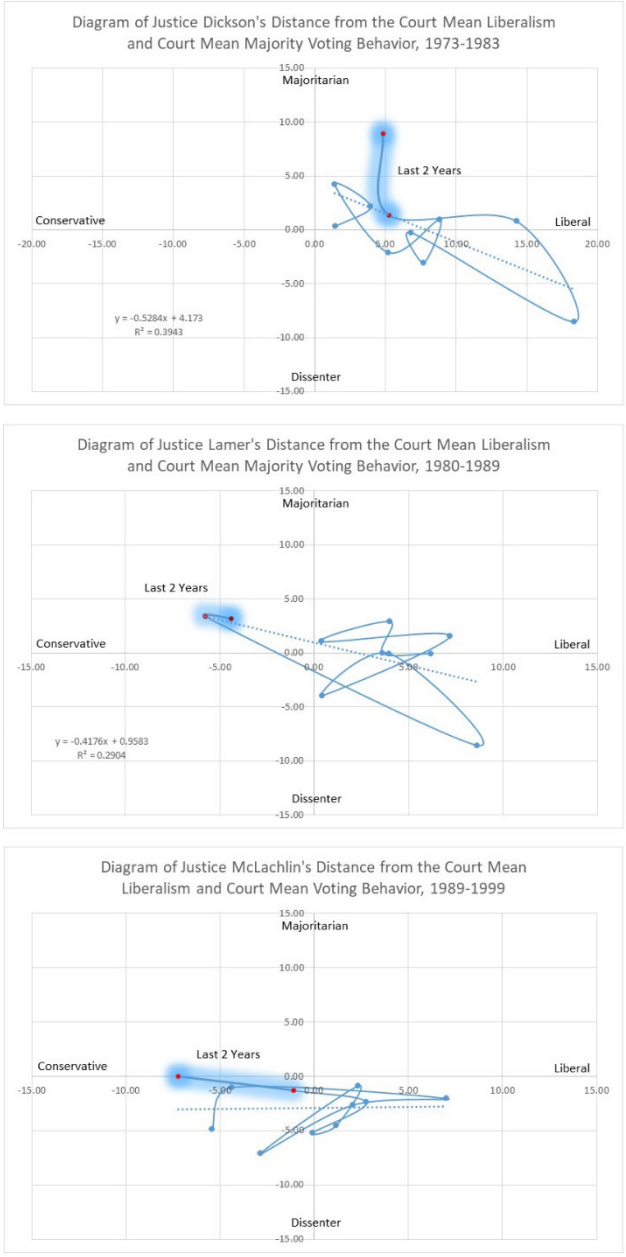
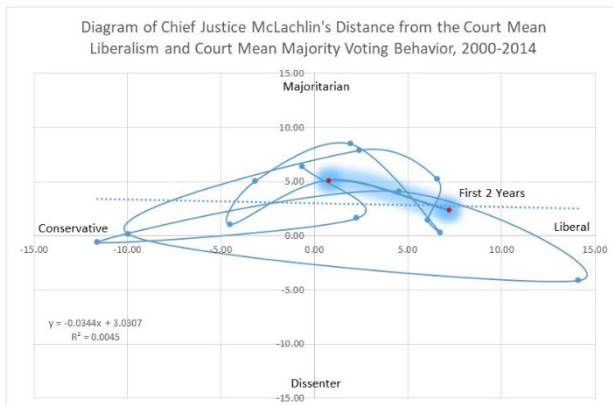
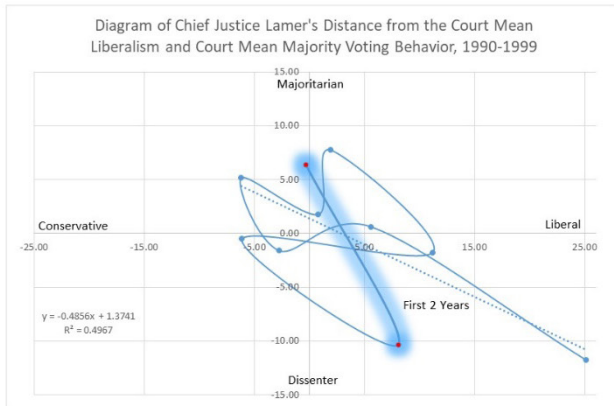
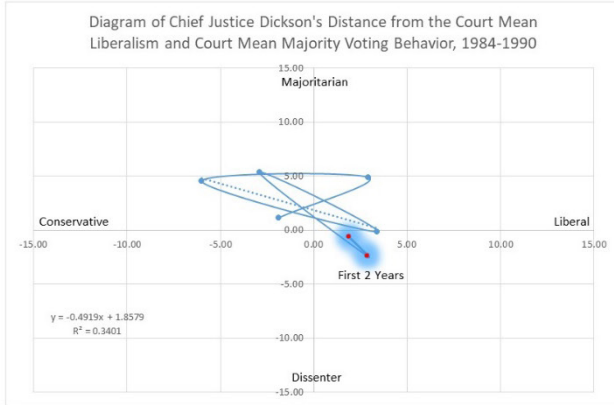


FIGURE 2: JUSTICE LIBERALISM AND MAJORITARIAN VOTING BEHAVIOUR RELATIVE TO THE COURT MEAN, PRE- AND POST-CHIEF STATUS, 1973-2014



When justices appear to the left of the centre line their annual voting records are more conservative than the mean justice for that year. When justices are above the horizontal centre line, their majority voting behaviour is higher than the average majoritarian justice. According to theory, we expect chief justices to have regression lines and predominant patterns of behaviour that are above the horizontal centre line (*i.e.*, if they are acting strategically, they should situate themselves more often in the majority coalition, at least in comparison to their earlier behaviour). Ideologically, it makes intuitive sense to think that justices more proximate to the centre vertical line will more likely be above the horizontal line. This aligns with the logic that ideologically moderate justices, or centrists, are more likely to be present in majority coalitions (for confirmation of this, think of Justice Anthony Kennedy in the United States and Justice Frank Iacobucci in Canada).⁵⁰ Our data coordinates in Figure 2 tend to document this trend, though the patterns across the three post-*Charter* chiefs are not constant. Justice Dickson's movement post-chief is more dramatic in terms of its ideologically conservative shift towards the centre of the Court (movement towards the left in the Figure 2.B). Justice Lamer, meanwhile, exhibits a pattern of behaviour across both graphs suggesting that as he found himself more liberal than the Court mean, he increased his tendency to vote in dissent. In fact, his most liberal distance from the mean appeared in his last year on the Court, resulting in his lowest majority voting percentage of his entire judicial career. The wide variation in his majority support scores suggests very little strategic ideological moderation on his part. While he successfully sought out the ability to write more majority opinions generally, it was sacrificed at the altar of any notions of ideological centrism. Put simply, he did not appear to care if he was ideologically proximate to the centre of the Court, especially in the waning days of his career. Justice McLachlin, meanwhile, exhibits the most majoritarian strategic behaviour of all three justices. Her voting record shifts noticeably upward after becoming chief (note the change in the level of the regression lines in Figures 2.E and 2.F). Her higher scores on majority voting tend to cluster around the vertical centre line, and nearly every post-chief year features a positive value relative to the Court mean on the majority voting score (in Figure 2.F). All of her pre-chief years are below the horizontal line (Figure 2.E). Justice McLachlin's graphs document clear strategic behaviour that is not necessarily rooted in ideological change. Rather, her wide swings in ideological position post-chief are less important than how

50. For discussion of Justice Iacobucci's role as a centrist justice, see Benjamin RD Alarie & Andrew Green, "The Reasonable Justice: An Empirical Analysis of Frank Iacobucci's Career on the Supreme Court of Canada" (2007) 57:2 UTLJ 195.

she increased her majority voting stances and suppressed her earlier tendency to dissent. These are hallmark patterns of two forces at work: (1) a strategic response to allow her to put her stamp on her own court's legal doctrines, and (2) a social leadership response on her part that is captured by the declining desire to participate in dissents from her colleagues' opinions.

A second point of significance in Figure 2 hinges on the behaviour immediately preceding elevation to chief status for all three justices. The two years immediately before chief status are highlighted in the left side graphs with blue shading, while the first two years of chief are highlighted on the right side. Note how each justice, immediately before becoming chief, altered their behaviour to become more majoritarian (Figures 2.A, 2.C, and 2.D). This, in and of itself, may be an interesting finding of strategic signaling to the powers that be in the Prime Minister's Office and the Department of Justice. If the parties responsible for vetting future chiefs pay attention to collegial, coalition-building behaviour, and if justices are aware that their majoritarian behaviour might be one of those key signals to become chief justice, we find an interesting nugget within our graphs of altered strategic voting in the year preceding a chief justiceship. It is also interesting to note, however, that for each new chief justice, the second-year data point is lower than the first, with each chief moving down and to the right in Figures 2.B, 2.D, and 2.F (exhibiting more liberal and less majoritarian voting in their second year as chief). This may reflect a rebalancing on the part of the chief back towards an expression of a latent independent streak. It may also reflect the changing dynamics of their courts. In each case, they faced membership transitions that may have pushed or pulled them in a slightly liberal direction. Such compositional change is somewhat controlled for in the graphs by using a mean benchmark comparison, but the possibility of membership change and court docket change argue for a more nuanced analysis that can take into account various explanatory variables.

C. OPINION AUTHORSHIP AND PATTERNS OF UNANIMITY AS PUISNE AND CHIEF JUSTICE

Table 2 highlights three other indicators of potential leadership behaviour: majority opinion authorship, dissent authorship, and the degree of unanimity within a court. Intriguingly, Justice McLachlin exhibits two of the most profound changes in Table 2. She clearly increased her majority opinion authorship during her own court (jumping from almost 9% as puisne to almost 18% post-chief). Linked with that was a substantial decrease in dissenting opinion output, dropping from 5.5% of cases to just 1.7% in her later years. One can infer from the data that these transformations are clearly not random, but rather reflect a strategic

positive shift towards task opinion leadership during her chief tenure, while also reflecting a more socially responsible pattern of dissent suppression that probably resonated well with her colleagues. Note how her change in patterns stands in stark contrast to the lack of change by Chief Justice Dickson's authorship activity or Chief Justice Lamer's dissenting authorship once they moved to the helm of the Court. Justice Lamer's rate of dissenting opinions, while not radically different from his earlier years, actually increased slightly during his chief period. This fact, in addition to the decline in unanimous opinions in Table 2, is another indicator that social cohesion probably suffered during Chief Justice Lamer's Court, and, at first blush, suggests that he did not seek a social leadership role on his own court. Granted, much of Justice Lamer's tenure as chief overlapped with that of the great dissenter Justice L'Heureux-Dubé, but one can speculate whether the greater rates of dissent found in the Lamer Court might have been different under a chief justice with more highly tuned social leadership skills. However, his rise in majority authorship by almost 7% indicates that he, like Justice McLachlin, seemed intent on enhancing his task leadership role on his own court. Even so, these conclusions are preliminary and without the assistance of multivariate analysis that controls for rival explanatory variables.

TABLE 2: EXPLAINING MAJORITY AUTHORSHIP, DISSENTING AUTHORSHIP, AND UNANIMOUS OPINIONS FOR PUISNE AND CHIEF JUSTICES DICKSON, LAMER, AND MCLACHLIN, 1973-2014

Justice	Percent Majority Author	Percent Dissenting Author	Percent Unanimous Opinions
Justice Dickson			
Puisne	11.4	3.2	75.1
Chief	14.7	2.0	79.0
Difference	+3.3	-1.2	+3.9
F Test	2.4	2.8	.8
Justice Lamer			
Puisne	11.0	2.3	82.4
Chief	17.9	2.6	73.9
Difference	+6.9	+3	-8.5
F Test	9.3 **	.1	11.2 **
Justice McLachlin			
Puisne	8.8	5.5	74.1
Chief	17.4	1.7	71.6

TABLE 2: EXPLAINING MAJORITY AUTHORSHIP, DISSENTING AUTHORSHIP, AND UNANIMOUS OPINIONS FOR PUISNE AND CHIEF JUSTICES DICKSON, LAMER, AND MCLACHLIN, 1973-2014

Justice	Percent Majority Author	Percent Dissenting Author	Percent Unanimous Opinions
Difference	+8.6	-3.8	-2.5
F Test	37.7 ***	36.5 ***	1.1

** significant at the 99% confidence level
 *** significant at the 99.9% level

D. EXPLAINING PATTERNS OF MAJORITY VOTING AS PUISNE AND CHIEF JUSTICE

Table 3 examines the majority voting behaviour of all three chiefs, with the analysis turning to a multivariate model that can assess the impact of other factors that help explain changes in chief activity. The results in the first two columns test for any chief effects across all three justices of interest, while the last two columns isolate any differences between Chief Justices Dickson, Lamer, and McLachlin over the 1973-2014 period while controlling for other variables in the equation. The Chief Justice Lamer indicator was omitted in the latter equation to test for statistically significant differences because he exhibited the smallest change in majority voting behaviour of the three justices. There are a total of seven variables in the first equation and eight in the second. Both overall models provide a robust explanation of the variance in majority voting, accounting for 31% and 27%, respectively, of the variance across the years in the study (adjusted R square = 0.31 for all chiefs and 0.27 for the model contrasting against Justice Lamer, both F tests are significant at the 99.9% confidence level). The findings in the first and second columns of the table reveal that four of the variables in the equation proved statistically significant at predicting majority voting of the three justices at or above the 99% confidence level. The most powerful variable in the equation was the chief justice variable indicating, as expected, that when they were elevated to the centre chair position they were overall 3% more likely to vote in the majority ($b = 3.4$, see the first column of Table 3). This provides confirmation of Danelski's theory that, collectively, when these justices became chief, they acted in a strategic manner. The three other variables that were in the expected direction and statistically significant were panel size, ideological distance from the Court mean, and *Charter* caseloads. The average panel size indicator featured a coefficient of -2.24 and suggests that as the average panel

size increased from seven to nine members, the three chief justices' tendencies to join the majority coalition decreased by 4% (2 multiplied by 2.24 = 4.48, see the first column of Table 3). Clearly, the size of a given panel has a direct impact on whether a justice joins the majority and thus has a greater opportunity to control the outcome of the Court. When the percentage of *Charter* cases increased by 10%, there was an almost 2% drop in the likelihood that the three justices would join the majority voting bloc ($b = -.17$, $10 \times .17 = 1.7\%$, see the first column of Table 3). Similarly, when the ideological distance from the mean grew, the three chiefs voted with the majority coalition less often ($b = -.32$). Put another way, if a justice was 10% more liberal than the rest of the justices in a given year, they would cast 3.2% fewer majority votes. The coefficients for these variables document the impact of a variety of factors that can either push or pull a justice towards the majoritarian centre of their court. Most importantly for leadership theories of judicial behaviour, the elevation to chief status clearly results in a positive strategic impact that produces more majority votes.

TABLE 3: EXPLAINING MAJORITY VOTING BEHAVIOUR BY JUSTICES DICKSON, LAMER, AND MCLACHLIN PRE- AND POST-CHIEF STATUS, 1973-2014

Variable	Estimation for All Chiefs		Chiefs Contrasted with Lamer	
	Coefficient	Std. Error	Coefficient	Std. Error
Chief Justice	3.43	1.35**		
Chief Year 1 or 2	-.52	1.79	.19	1.80
Average Panel Size	-2.24	.82**	-2.61	1.05**
Ideol. Distance from Mean	-.32	.08***	-.29	.09***
Percent Charter Cases	-.17	.05***	-.13	.05**
Number of New Justices	.62	.67	.19	.73
Number of Cases	-.04	.03	-.02	.03
Dickson as Chief			2.35	1.82
McLachlin as Chief			4.23	2.22*
Constant	113.82	6.62	114.19	7.28
Adjusted R Square	.31		.27	
F Test	4.94***		3.90***	
Number of Observations	64			64

* significant at the 95% confidence level

** significant at the 99% confidence level

*** significant at the 99.9% level

The data in the third and fourth columns of Table 3 takes into consideration possible differences in majority voting behaviour between the three chiefs, as was suggested by Table 1. Given that Justice Lamer exhibited little change in his voting behaviour, his indicator was kept out of the equation for comparison purposes. The second half of Table 3 suggests that much of the chief justice transition effect is due to the behavioural difference of Justice McLachlin. The findings indicate that only Chief Justice McLachlin exhibited statistically significant difference in majority voting behaviour from Chief Justice Lamer ($b = 4.23$, significant at the 95% confidence level), indicating that she was 4% more likely than Justice Lamer to vote with the majority once controlling for other variables in the equation. While Chief Justice Dickson did join the majority more often than Chief Justice Lamer, his change was not statistically significant and suggests that he did not transform his status as a joiner of opinions, certainly not as much as his female successor did. Meanwhile, the same three other variables that proved statistically significant across all the chiefs were significant in this equation as well. Collectively, these findings reinforce the findings from Table 1, suggesting that Chief Justice McLachlin acted in the most strategic manner of the three justices, changing her behaviour to become the consistent social leader of the majority of her court. This pattern of majority voting change stands up in the face of other rival explanatory factors for her behaviour, and it fits with her own comments and expert reports on her approach to leading the Court more cohesively and collegially.⁵¹

E. EXPLAINING PATTERNS OF MAJORITY AUTHORSHIP AS PUISNE AND CHIEF JUSTICE

An interesting question that dovetails with increased majority voting is whether that transformation results in a concordant increase in majority opinion writing—one of the hallmarks of task leadership in any court of last resort. Table 4 provides regression results to confirm the expectation that chief justices will strategically work to assume this leadership role. Like the prior model, it examines the opinion-writing relationship for all three justices collectively in the first two

51. Chief Justice Beverly McLachlin, “The First Decade of the 21st Century: The Supreme Court of Canada in Context” in David A Wright & Adam M Dodek, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) vii; Peter J McCormick, *The End of the Charter Revolution: Looking Back from the New Normal* (Toronto: University of Toronto Press, 2015) at 121-22; “Chief Justice Beverley McLachlin announces her retirement after 28 years on Canada’s top bench,” *The National Post* (12 June 2017), online: <nationalpost.com/news/politics/chief-justice-beverley-mclachlin-announcers-her-retirement-after-28-years-on-canadas-top-bench>.

columns of the table and relative to each other in the third and fourth columns of the table, this time omitting Justice Dickson because he altered his behaviour the least. The overall statistics provide robust models, with the adjusted R Squares of 0.42 and 0.49, which means that the model explains 42% and nearly 50% of the variance in the justices' majority opinion writing behaviour (statistically significant at 99.9% confidence level, see the Adjusted R Square values in Table 4). Like the previous table, the most important variable in the equation is the chief justice variable, indicating that collectively the three justices increased their majority writing output four percentage points as chief justice, allowing them to exert more control over the direction of the Court (statistically significant at the 99% confidence level). Two other indicators are significant predictors of majority opinion output: (1) whether a chief justice was in his or her honeymoon period (denoted by the first two years, $b = 3.39$, significant at the 95% confidence level), and (2) the percentage of times they were in the majority coalition. For every 3% increase in majority votes in a year, the justices tended to write 1% more majority opinions ($b = 0.36$, $3 \times 0.36 = 1.08$, significant at the 99% confidence level). Readers should note that the effects of chief justice status on majority opinion output are mainly derived from strategic changes made by Justices Lamer and McLachlin. When we omit Justice Dickson from the equation, the R Square value improves, and the impact of the indicators for Justices Lamer (6.12% change) and McLachlin (5.84% change) are substantially higher than in the first model (4.40%, see Table 4). The data for Chief Justice McLachlin is particularly compelling because it reflects a departure from our initial findings of lower majority opinion output by Chief Justice McLachlin in the first two years of her leadership.⁵² Put simply, the addition of 12 years of data documents an increasing tendency on Chief Justice McLachlin's part to write more majority opinions for her court. Such a transformation reflects the signature patterns of a task leader. All in all, the regression models reinforce the leadership literature's central theoretical proposition that puisne justices who become chief can use the act of voting more frequently in majority coalitions to help cement their ability to lead their court. Moreover, the models help establish the unique strength of the strategic behavioural change undertaken by Justice McLachlin. She is the quintessential majoritarian leader on her court, having softened her dissenting voting stances of the past to help build social cohesion and collegiality, which has arguably strengthened the reputation of the Court.

52. Wetstein & Ostberg, *Strategic Leadership*, *supra* note 35 at 665.

TABLE 4: EXPLAINING MAJORITY OPINION AUTHORSHIP BY JUSTICES DICKSON, LAMER, AND MCLACHLIN, 1973-2014

Variable	Estimation for All Chiefs		Chiefs Contrasted with Dickson	
	Coefficient	Std. Error	Coefficient	Std. Error
Chief Justice	4.40	1.51**		
Chief Year 1 or 2	3.39	1.90*	4.13	1.71**
Average Panel Size	-.28	.93	-1.38	1.10
Ideol. Distance from Mean	.03	.10	.01	.09
Percent Charter Cases	.08	.06	.08	.05
Number of New Justices	-.30	.72	-.19	.71
Number of Cases	-.02	.03	-.02	.03
Percent Majority Votes	.36	.14**	.36	.13**
Lamer as Chief			6.12	1.57***
McLachlin as Chief			5.84	2.25**
Constant	-19.93		-12.87	
Adjusted R Square	.42		.49	
F Test	6.76***		7.67***	
Number of Observations	64		64	

* significant at the 95% confidence level

** significant at the 99% confidence level

*** significant at the 99.9% level

Simultaneously, she transformed herself into a pivotal task leader within her court, positioning herself to have a greater shot at writing for the Court more frequently.

F. EXPLAINING PATTERNS OF DISSENTING AUTHORSHIP AS PUISNE AND CHIEF JUSTICE

If majority opinion authorship is a key indicator of task leadership, lack of dissenting authorship might be seen as a flip-side symbol of social leadership. When justices suppress their dissent, they are likely to be expressing ideological assent, or more significantly, deciding not to ruffle feathers while they harbour ideologically opposed views. When the latter behaviour occurs, justices are acting strategically to enhance the social relationships within the court and foster greater cohesion. Table 5 turns to an indirect barometer of social leadership,

analyzing patterns of dissenting opinions by the three justices before and after their promotion to the centre chair. Overall patterns are characterized in the first two columns of the table, while possible differences between the three justices are tested in the third and fourth columns of the table. This model controls for ideological distance in order to tease out whether reduced patterns of dissent are evident because of an element of social leadership or ideological agreement, while simultaneously assessing whether chiefs express dissent less frequently. Both overall models provide a robust explanation of the variance in dissenting opinion authorship rates, accounting for 40% and 33% of the variance across the 41 years of the study (adjusted R square = 0.40 for all chiefs and 0.33 for the model contrasting against Justice Dickson, both F tests are significant at the 99.9% confidence level). The findings in the first two columns of Table 5 indicate that the chief justice variable provides the most important explanation for change in dissenting opinion authorship. When the three justices moved to the helm of the Court, they collectively reduced the number of dissents they authored by almost 2.5%. This finding provides additional evidence to support Danelski's claim that when justices move to the centre chair they have the power to curb their dissenting authorship activity to bring more cohesion to the Court.

Four other variables proved statistically significant in the equation, and three of them were in the expected direction. For each new justice appointed to the bench in any given year, the chief justice is likely to reduce the number of dissents he or she authors by over 0.5% ($b = -0.57$, statistically significant at the 95% confidence level). This finding suggests that new justices encourage chiefs to act more collegially and try to create more cohesion on the bench. As expected, when the ideological distance from the mean of the Court grew, the three justices were more likely to write dissents ($b = .11$, significant at the 99.9% confidence level). A more understandable way to interpret this is that if the three justices are 10% more liberal than the rest of the justices in a given year, they would write 1.1% more dissents in that year. As expected, when the percent of *Charter* cases grew in a given year, the percent of dissenting opinions authored by the three chiefs increased by 0.10%. In other words, for each additional 10 *Charter* cases heard in a given year, the justices were likely to write 1 more dissenting opinion. Given that *Charter* cases are likely to garner more conflict among members of the Court, this finding is not particularly surprising. However, contrary to expectations, the findings suggest that as the number of cases increased in a given year, the three chief justices were more likely to write dissenting opinions ($b = .02$, statistically significant at the 95% confidence level). Thus, if the Court were to increase the workload by 20 cases in a given year, the dissenting opinion output would increase

by almost 0.5% ($b = .02 \times 20 = .40$, see Table 5). One could posit that this makes sense because the more cases one hears the more likely that conflict could emerge on the Court, leading to greater dissent activity by these three justices.

TABLE 5: EXPLAINING DISSENTING OPINION AUTHORSHIP BY JUSTICES DICKSON, LAMER, AND MCLACHLIN, 1973-2014

Variable	Estimation for All Chiefs		Chiefs Contrasted with Dickson	
	Coefficient	Std. Error	Coefficient	Std. Error
Chief Justice	-2.46	.57***		
Chief Year 1 or 2	.19	.75	-.46	.76
Average Panel Size	.56	.34	.78	.46*
Ideol. Distance from Mean	.11	.04***	.12	.04***
Percent Charter Cases	.10	.02***	.09	.02***
Number of New Justices	-.57	.28*	-.637	.32*
Number of Cases	.02	.01*	.03	.01*
Lamer as Chief			-2.21	.69***
McLachlin as Chief			-2.00	.97*
Constant	-3.15		-5.53	
Adjusted R Square	.40		.33	
F Test	7.06***		4.93***	
Number of Observations	64		64	

* significant at the 95% confidence level

** significant at the 99% confidence level

*** significant at the 99.9% level

The third and fourth columns of Table 5 provide a more in-depth understanding of the differences in the dissent authorship among the three chiefs. Chief Justice Dickson was kept out of the equation for comparative purposes because his dissent authorship changed the least. When controlling for other variables in the equation, both Justice Lamer and Justice McLachlin's dissenting opinion authorship declined by 2.2% and 2.0% respectively after they became chief compared to Justice Dickson (significant at the 99.9% and 95% confidence level). These findings help shore up the data for Justice McLachlin in Table 2 and show that when controlling for other variables in the equation, Justice Lamer's dissent output actually decreased significantly when compared to

his male predecessor, which runs counter to the findings in Table 2. Table 5, then, provides an important rationale for controlling for rival variables in the equation. The initial impression of Justice Lamer dissenting more frequently is somewhat misguided because it fails to take into consideration factors that might foster dissents, including a larger volume of *Charter* cases, new members on the Court, and a growing docket of cases under Chief Justice Lamer's tenure. Put another way, Justice Lamer's dissenting behaviour during his tenure as chief does not look so bad in the context of the volume and types of cases his court grappled with, and he shows some signs of strategic dissent suppression. The most compelling finding from Table 5, however, is the overwhelming evidence of the extensive strategic social leadership activity of Chief Justice McLachlin.

G. EXPLAINING CHANGES IN PANEL SIZE ON THE SUPREME COURT OF CANADA

What is most striking about the McLachlin transition to the power roles of task and social leader is how it was accompanied by a tendency to grow average panel sizes over time. Table 6 presents this tendency in stark relief, examining the average panel size as a dependent variable across the three chief justice tenures. It essentially tests for whether there was a change in the panel size across the three chief tenures while considering possible rival explanations for this phenomenon. The overall model provides a robust explanation of the variance in the average panel size, accounting for 45% of the variance across the years in the study (adjusted R square = 0.45, F test significant at the 99.9% confidence level). The equation omits Justice Lamer's indicator for comparative purposes, and reveals that only the "McLachlin as Chief" variable and the number of new justices provide statistically significant predictors of the average panel size. The latter variable indicates that for each new justice appointed to the bench in any given year, the chief justice is likely to reduce the average panel size by almost 0.25% ($b = 0.23$, statistically significant at the 99% confidence level). This finding suggests that there is some legitimacy to the contention that chief justices allow new justices a bit of time to acclimate to the top bench before throwing them fully into the panel rotation. Over the course of Chief Justice McLachlin's tenure she increased the average size of deliberating panels by more than one justice ($b = 1.22$ statistically significant at the 99.9% confidence level). This finding is significant because logically as one increases the average size of panels, there is a greater likelihood disagreement will emerge and, as Table 2 indicates, the less likely the justices collectively will join the majority opinion. This table suggests that Chief Justice McLachlin's social leadership behaviour was unique

in that she not only increased the average size of the panels but joined majority opinions more frequently despite the fact that she maintained relatively the same ideological distance from her colleagues as when she was a puisne justice. These combined findings suggest that Justice McLachlin deserves the title of “super social leader” because she changed her behaviour so drastically in relation to her former male colleagues.

TABLE 6: EXPLAINING THE CHANGE IN AVERAGE PANEL SIZE ACROSS THE DICKSON, LAMER, AND MCLACHLIN COURTS, 1973-2014

Variable	Chiefs Contrasted with Lamer	
	Coefficient	Std. Error
Dickson as Chief	-.22	.23
McLachlin as Chief	1.22	.23***
Chief Year 1 or 2	.02	.23
Percent Charter Cases	.00	.01
Number of New Justices	-.23	.09**
Number of Cases	.01	.00
Constant	6.12	.45
Adjusted R Square	.45	
F Test	9.45***	
Number of Observations	64	

* significant at the 95% confidence level
 ** significant at the 99% confidence level
 *** significant at the 99.9% level

The last finding presents a central kernel that must be attributed to Justice McLachlin’s leadership of her court. She became more majoritarian while also increasing the level of justices’ participation on case panels. Those are two phenomena that would normally cut against each other. Yet we believe she was able to do this most likely because of her social leadership acumen. She clearly cares about the nature of consensus building and the importance of the Court speaking with a unified voice (she has said so directly).⁵³ The fact that she was able to retain remarkably strong patterns of majoritarian voting and maintain relatively high levels of unity across the Court while growing panel sizes is a

53. McLachlin, *supra* note 51.

remarkable feat of leadership. One reason for her success may be that, during her tenure, the Court as a whole was shrinking its overall docket. The caseloads of the Lamer Court were typically at or above 100 per year.⁵⁴ The McLachlin Court averaged between 60 and 75 per year. Such a transformation in workload suggests an additional pattern of social leadership is in play. When docket sizes decline in such a manner, more justices can be appointed to panels, making the work feel more equalized and balanced in terms of cases heard, equalizing opportunities for writing, and potentially enhancing the overall collegial esprit de corps. These are patterns of female leadership behaviour that are cornerstones of the feminist literature. For all of these reasons—greater majoritarian voting, suppressed dissenting opinion patterns, increased panel sizes, and decreased docket sizes—Chief Justice McLachlin exhibits hallmark attributes of an exemplary strategic social and task leader.

IV. CONCLUSION

Theories of leadership and strategic behaviour posit that individuals ascending to the chief justice position alter their behaviour in significant ways to define the legacy of their court. Recent empirical work has examined the postulates of Danelski's leadership theory in great detail in the Supreme Court of the United States,⁵⁵ and there is growing interest in the leadership traits of SCC justices. Our work builds on earlier scholarship in this area by documenting these patterns more extensively across six key indicators of judicial behaviour, including majority voting behaviour, majority and dissenting opinion authorship, ideological and majority positioning within a court, and panel sizes. The concordance of data indicates that Chief Justice McLachlin changed her behaviour the most dramatically of the three modern chief justices of the SCC. She transformed from one of the most prolific dissenters during her *puisne* years into a chief who dramatically curbed the number of dissents she wrote, joined the majority coalition more often, and nearly doubled her majority opinion authorship patterns. Her transformation is indicative of a justice who strove to become both the social and task leader of her

54. Supreme Court of Canada, "Statistics 2007 to 2017" (28 February 2018), online: <www.scc-csc.ca/case-dossier/stat/cat4-eng.aspx>; Peter McCormick, "Where Does the Supreme Court Caseload Come From? Appeals from the Atlantic Courts of Appeal, 2000-2005" (Paper delivered at the Annual Meeting of the Canadian Political Science Association, 2 June 2006), online: <www.cpsa-acsp.ca/papers-2006/McCormick.pdf>.

55. See Danelski & Ward, *supra* note 5.

court. She fostered a more cohesive and collegial court through her suppression of dissent and her willingness to grow panel sizes amidst a shrinking docket.

Chief Justice McLachlin's emergence as a unique kind of social and task leader raises an important question about the role of her gender in shaping such a transformation. Was her leadership transition the byproduct of her unique skills and personality attributes or was there some component of feminist thinking embedded in her operational style as the first woman to be "first among equals?" We can only speculate without questioning her directly on this point. Yet her empirical patterns of behaviour, and the manner in which she has described the Court's operations and its role suggests she paid great attention to the norms of collegiality, reaching greater agreement, speaking with one voice, and protecting the Court from criticism as a political institution. These traits match up well with notions drawn from the literature depicting a different feminine voice. Obviously, we do not want to draw definitive conclusions in a study of just one female chief justice, but Chief Justice McLachlin's language often reflects the spirit of conciliation, compromise, fairness, and unity, all of which echo from the works of Tannen and Gilligan.⁵⁶ When these patterns of language are coupled with her lessened tendency to dissent and greater tendency to allow more justices to participate in cases heard by the Court, we suspect that a feminine difference was clearly in play with Chief Justice McLachlin. It will be interesting to see if this gender distinction becomes something of a pattern with the appointment of another female chief justice.⁵⁷

Chief Justice McLachlin's leadership transformation is not to be seen as negating the task leadership skills of her predecessors. While Chief Justice Lamer's majority opinion authorship patterns clearly document that he was an overall task leader on his own court, evidence of Justice Dickson's leadership activity is less pronounced because our analysis has placed him in contrast to the other two post-*Charter* chief justices. Prior research has documented that Chief Justice Dickson exhibited profoundly strong task leadership in key areas of law, most notably in the fields of civil rights and liberties and the environment.⁵⁸ We also know from prior work that Chief Justice Lamer acted as a central opinion author

56. Tannen, *supra* note 15; Gilligan, *supra* note 13.

57. Researchers will have to wait for that day to come. In December 2017, Justice Richard Wagner was appointed as the new chief justice of the Supreme Court of Canada. See Supreme Court of Canada, News Release, (12 December 2017), online: SCC Lexum <scc-csc.lexum.com/scc-csc/news/en/item/5694/index.do>.

58. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 22 at 119; Matthew E Wetstein & CL Ostberg, *Value Change in the Supreme Court of Canada* (Toronto: University of Toronto Press, 2017) at 52-53.

in the criminal law cases across his entire tenure on the Court.⁵⁹ This finding points to a unique feature of how the Court operates, namely that the chief justices, through their opinion assignments, are willing to allow different justices to play key leadership roles in different areas of law based on their legal specialization and interests. Indeed, interviews with the justices confirm this tendency to solicit volunteers based on specialization and workload considerations.⁶⁰ The limitations of our study prevent an analysis of this characterization of judicial leadership. We leave to another day the exploration of the nuances found in discrete areas of law, patterns of separate concurrences, patterns of behaviour in written reasons for judgment only, and more importantly an examination of the internal dynamics within a court that would help document the social leadership patterns on the post-*Charter* courts. Despite this caveat, the empirical patterns from this study indicate that at the twilight of her tenure, Chief Justice McLachlin cemented her legacy as a justice who was able to simultaneously serve as a social and task leader on the top court of Canada.

59. Ostberg & Wetstein, *Attitudinal Decision Making*, *supra* note 22 at 72-74.

60. Greene et al, *supra* note 34; Songer et al, *Law, Ideology*, *supra* note 22.