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

Benjamin Alarie

Version Post-print/accepted manuscript


Publisher’s Statement Reproduced with permission of the University of Toronto Law Journal

How to cite TSpace items

Always cite the published version, so the author(s) will receive recognition through services that track citation counts, e.g. Scopus. If you need to cite the page number of the author manuscript from TSpace because you cannot access the published version, then cite the TSpace version in addition to the published version using the permanent URI (handle) found on the record page.

This article was made openly accessible by U of T Faculty. Please tell us how this access benefits you. Your story matters.
Donald R. Songer, an American political scientist, highlights in the introduction of his recent book that he is not Canadian and has no legal training (p. 10). Readers inclined to be uncharitable might take this admission as evidence that Songer is ill-suited to carry out the task of analyzing the Supreme Court of Canada in a subtle or careful way. The unfairness of such a snap judgment is obvious. Indeed, anticipating this concern, Songer himself claims that his “outsider” status possibly confers the advantage of “a perspective that may be somewhat different from those of ‘insiders’ and thus help to cast new light on some recurring themes in discussions of the Supreme Court of Canada” (p. 11). This may well be the case; after all, many Canadian observers and commentators have criticized the legitimacy of the Court’s decision-making in particular cases or its role more generally out of a normative distaste for the results of the Court’s toil. Songer himself claims to be in a position to be able to avoid these normative concerns. How successful is Songer in casting new light on the Supreme Court of Canada with the benefit of this more disinterested and external perspective?

Begin with what Songer intends to accomplish. The use of the phrase “the transformation” in the title of the book at once suggests two principal possibilities for Songer’s ambition. The less ambitious possibility is that Songer takes as axiomatic the notion that the Supreme Court of Canada has been transformed, and that the goal of the work therefore is to describe empirically this assumed transformation. Another more ambitious possibility is that the proffered empirical examination will be carefully and critically deployed to assess the degree to which the Court has evolved over time and the ways in which, if any, the role it plays in contemporary Canadian society has been altered. The more ambitious of the two intentions is the more natural way of interpreting the title, and gives rise to the expectation that Songer will show that the Court has been transformed from an institution with “X” characteristics to an institution

---

1 Faculty of Law, University of Toronto. The author thanks Andrew Green and Hamish Stewart for helpful comments on an earlier version of this review.
with “Y” characteristics; it is also, as it turns out, what Songer has in mind. The book delivers to
a significant extent on this promise in describing changes from 1970 to 2003 along several
dimensions—in the justices (more women), appeals (more criminal and constitutional cases),
and litigants (fewer private economic disputes and more state-individual disputes). Songer’s
empirical presentation of these changes are informed by the published records in the Supreme
Court Reports and, in what is the most intriguing and novel aspect of Songer’s research,
interviews with ten current and former justices of the Court and four former law clerks.

In chronicling the transformation of the Court, Songer claims that four themes emerge from his
multi-layered and multi-faceted analysis: (i) the introduction of the Charter largely transformed
the Court’s role in Canadian law and politics; (ii) the Court must be understood as a legal and a
political institution; (iii) the Court, although political, is politically moderate; and (iv) that the
Court is more democratic and less elitist than the comparable courts of other countries.
Consider each of these claims in turn.

With respect to the first claim—that the Charter is largely responsible for the Court’s
transformation from one focused on private law disputes to broader social concerns—Songer
states in the introduction that the Court’s “agenda is now dominated by questions of
constitutional and statutory interpretation” (p. 7). To support this claim, he notes that appeals
involving statutory interpretation and appeals involving constitutional interpretation are jointly
“dominant.” Later we learn that, despite a spike in the mid-1980s, the rate at which the Court
hears appeals involving statutory interpretation has not changed much on average from the
immediate pre-Charter period in the early 1980s, and in recent years has stabilized at about
25% of the Court’s docket (p. 67). Instead, it is the constitutional cases that have increased in
frequency, with most of this increase being attributable to Charter appeals. Naturally, following
the introduction of the Charter there can only be more Charter litigation, which leads to
questions about the novelty and significance of the broader assertion of ‘dominance.’ Songer
also claims that in the post-Charter era that the “justices of the Supreme Court now possess
nearly complete docket control; almost all cases now come to the Court through leave-to-
appeal petitions, which are granted at the justices’ discretion” (p. 76). This is somewhat
inaccurate. According to the Court’s own published statistics, over the period from 1998 to 2008, a total of 177 appeals were heard by the Court as “as of right” and 723 appeals were heard “by leave” of the Court; fully 20% of the Court’s docket remains outside of its control.\(^2\)

Aside from these observations, though, Songer presents a compelling case that since the early 1970s appeals involving various conflicts between the state and individuals (including criminal law and civil liberties), have tended to crowd out private law appeals.

Songer’s second claim, that the Court is both legal and political, is perhaps not as well supported empirically as the first. Songer articulates two aspects of this ‘legal and political’ theme. The first is the political role of the Court as an institution and the second relates to the how the justices themselves as individuals decide appeals. It is possible to question both aspects of the claim. With respect to the first, the Charter appeals that Canadian courts are asked to hear and decide are in every respect legal appeals; the way to see that they are “legal” cases is clear—as part of the Canadian constitution, the Charter is a legal document, rather than a political one. It is entirely possible for legal decisions to have political consequences without the decisions being political in nature (e.g., a finding of non-compliance with campaign finance laws may well have political consequences, but it would not necessarily make an observation by a judge of obvious non-compliance with the law ‘political’; on the other hand, it is of course possible to imagine a judge allowing personal political preferences to influence a finding of whether there has been a violation of campaign finance laws). Despite its central importance to the political part of the claim that the Court as an institution plays a role that is both political and legal, Songer fails to mention section 33 of the Charter, known as the “notwithstanding clause,” which allows a provincial legislature or the federal Parliament to override temporarily (though the override can be indefinitely extended) decisions of the Court invalidating a particular statute or government action through an infringement of Charter rights secured by sections 2, or 7-15. Songer’s oversight is important, but it is understandable given that there is no comparable method for the US Congress, for example, to override similar rights-affecting decisions of the US Supreme Court. To his credit Songer does not hasten into the trap of

accusing the Court of being staffed with activist justices. Songer recognizes that the Court is being “called on to decide a large number of issues that are politically salient and highly charged” and that it “is not the justices” who “have decided that the Court will play a political role; that role is basic to its mandate” (p. 243). It is unclear, though, whether Songer realizes that unlike the United States, Canadian politicians are usually the ones holding the trump cards, and that this tends to undermine the claim that the Court is routinely forced to play politics in addition to fulfilling its adjudicative mandate.

With respect to the second aspect of the law and politics claim—that that justices are deciding cases in keeping with their own policy preferences, Songer reports that, the “consensus of the literature reviewed … was that at least in divided decisions, there have been consistent alignments among the justices which suggest that differences in political attitudes are in play” (p. 244). He continues, stating “the evidence that the political preferences of the justices have some influence on their voting choices seems to be extremely well-established” (p. 244). Recent work by Alarie and Green\(^3\) calls into question the strength of this conclusion. Alarie and Green analyze the voting behavior of the justices of the Supreme Court of Canada and show that justices’ policy preferences are weakly correlated with the party of the appointing Prime Minister and with the descriptions of political attitudes by editorials in major Canadian newspapers at the time of a justice’s nomination. Alarie and Green (OHLJ, 2009) also find that revealed policy preferences shifted considerably and unpredictably over time, contrary to Songer’s claim of “relatively high consistency for most justices from one time period to the next” (p. 244). Presumably these results were not available at the time of writing. Nevertheless, it is unfortunate that Songer’s research was not able to incorporate these contradictory analyses, while citing studies that are more consistent with the view that emerges from American literature on the US Supreme Court. Despite this, Songer reports on

the basis of his interviews with the justices that, “None of the justices appeared to accept the view that the Court is either a purely legal or a purely political institution” (p. 246).

With respect to the third claim, that the justices are political but nevertheless moderate, Songer reports “strong evidence that whether one calls them judicial philosophies or political ideologies, the attitudes and policy preferences of the justices are strongly related to the decisions they make” (p. 209). What is strange in light of the mildness of his findings of the Court as a whole—the Court decided 75% of the cases over the 1970 to 2003 period without a dissent—is that Songer does not seem to seriously entertain the possibility of not finding politicization or the expression of judicial policy preferences. Nevertheless, Songer appreciates and acknowledges that the analysis of divided appeals of Chapter 7 must be read in conjunction with the examination of unanimously resolved appeals in Chapter 8. Of the divided appeals analysis, he cautions that, “One very strong caveat is in order, however: all of the above analyses are based only on cases in which the Supreme Court was divided. Since a large majority of all cases decided by the Court result in unanimous decisions, one should not jump to the conclusion that what has been found to explain the divided decisions necessarily serves as an explanation of decision making in all cases” (p. 209). Surely the manner in which he sets up the problem partly dictates the finding that justices indulge individual policy preferences. This tension is brought out explicitly in the “unanimous decisions” discussion in Chapter 8. A legal academic cannot help but be distracted by Songer’s characterization of “unanimous decisions” as those in which there is not a dissent. In Songer’s analysis, all that is necessary is that the justices agree on the disposition of the appeal, rather than the reasons given for the disposition. It would surprise many of the justices who authored sharply differing concurring judgments in many of the appeals that the source of the disagreement is disregarded. Disregarding concurring reasons cuts both ways, of course. It is possible to disagree with the reasoning of a majority of the Court on the basis of ‘policy preferences’ and yet reach the same disposition on an appeal. Similarly, it is possible to dissent for purely legal reasons in an appeal, on the basis of a disagreement about the application of positive law. In this way, the appeals considered in the analyses of both Chapters 7 and 8 are under and over-inclusive. It would have been helpful for Songer to note that about 80% of the appeals that he describes as
“unanimous decisions” were in fact decisions in which all of the justices subscribed to the same set of reasons, which reflects a strikingly higher level of consensus in both reason-giving and in appeal disposition than, for example, on the US Supreme Court.

Songer’s fourth and final general claim is that “the analysis in this study suggests that there is a sense in which the Supreme Court of Canada can be understood as relatively ‘democratic’ compared to many other courts around the world” (p. 250). On this point Songer’s analysis is strong. Although he notes that justices are drawn from those with considerably more educated and privileged socioeconomic backgrounds (p. 250), Songer assembles evidence showing that Canadian justices are: (i) regionally diverse (p. 28); (ii) educated at a wide variety of institutions at the post-secondary level (p. 32), with 37 justices in the sample having attended 15 different law schools; and (iii) traditionally from broadly representative religious backgrounds (45.9% Catholic, 40.5% Protestant, 10.8% Jewish, and 2.7% not known). This aspect of the work is well done. Although one might question the relevance of religious backgrounds in a society where religion is less socially salient than it is in the US, it does not do any violence to include the information, especially since Catholicism is likely to be correlated with francophone influences in judicial backgrounds.

Taken together, Songer has produced a study that brings a considerable amount of empirical analysis to an institution that merits careful empirical study and analysis. Particular strengths include the interviews that Songer conducted with ten justices, and the analysis of the backgrounds of the 37 justices who sat on the Court over the 1970 to 2003 period. The weaknesses principally emerge in Songer’s discussion of particular legal issues. For example, he describes the Court’s control over its docket since 1997 as “nearly complete” (despite almost 20% of the appeals being heard by the Court without discretion), and misses the significance of the “notwithstanding clause” in diminishing the political role of the Court as an institution. It is also unfortunate that Songer was not able to draw on the most recent empirical analyses of the Court’s decision-making, which would cast some doubt on whether justices clearly and consistently over time decide in consonance with individual policy preferences. This concern is partly compensated for by Songer’s reference to interviews with several of the justices
indicating that they regard division as sometimes being sourced in differing judicial philosophies.

Following Songer’s work, open and important questions remain surrounding what, precisely, gives rise to the differing judicial philosophies of the Court’s justices, and whether they are appropriately characterized as “policy preferences.” Although this term can be convenient as shorthand, it may seemingly constrain the possible types of disagreement to the political or ideological in nature rather than legal or philosophical. It is natural that differing judicial philosophies may run deeper than preferences over government policy, and that there are hidden dimensions of thinking about the judicial role that Songer approaches but leaves unearthed. It is difficult not to be left with the feeling that although Songer has quite helpfully plucked some of the lowest hanging fruit, the empirical harvest has merely begun.