

1 Judges and Judicial Decision Making

What are the factors that influence judges in judging? The question continues to spark heated debates among legal scholars. Until the early 20th century, Anglo-American legal thought was dominated by the legal formalists, who assumed that judges mechanically deduce the law from abstract legal norms. In the early 20th century, such legal formalism was attacked by American legal realists, who argued that judges decide cases based on extra-legal factors including social, political and economic dimensions of the cases as well as the idiosyncratic views on politics and policies of the judges themselves.

The legal realists' claim that judges are influenced by extra-legal factors in deciding cases can be tested empirically. Since the late 1940s, American political scientists have used quantitative methods to examine judicial decision making in the U.S., especially that of the U.S. Supreme Court. Over the years these quantitative researchers have used increasingly advanced quantitative techniques, and they have developed a substantial body of knowledge on judicial decision making in the U.S. In contrast, researchers have only made sporadic attempts in producing quantitative studies on Canadian judicial decision making. Most of these studies focus on judicial decision making in the Supreme Court of Canada.

So far, quantitative research on whether extra-legal factors influenced judicial decision making has found no universally applicable answers as some variables can explain certain judicial behavior in some situations but not in others. Still, the body of

past research has shed light on Canadian judicial decision making such as judicial decision making in *Charter* cases.¹ But influences of extra-legal factors in judicial decision making in Canadian income tax cases have not been thoroughly examined.

Building on prior quantitative research on judicial decision making, this dissertation examines the influences of selected socio-demographic characteristics of judges in their decision making in Canadian income tax cases. The dissertation aims to explore the judicial behavior of judges as socio-demographic groups rather than the judicial behavior of individual judges. To do that, the dissertation focuses on judicial decision making in the Supreme Court of Canada and the Tax Court of Canada. The reason why the Federal Court of Appeal is left out of the mix is mainly because of the setup of the data analysis, which is in turn a function of the constraints of time and resources. The data analysis was first performed on Supreme Court of Canada data and then the modeling approach used was tested on Tax Court of Canada data. The idea is to develop a modeling approach and then test its applicability in a different dataset, and so only two datasets from two courts are needed for the dissertation. Using only data from two instead of three courts saves a lot of time in original dataset development and data analysis. But for the next step in quantitative research on judicial decision making in Canadian income tax cases the Federal Court of Canada should be included.

The examination of judicial decision making in the two courts was conducted in the form of exploratory data analysis. The main objective of an exploratory approach is to

¹ *Canadian Charter of Rights and Freedoms*, part I of the *Constitutional Act*, 1982, being schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

determine what kind of information can be obtained from the data. That may sound very similar to what data analysis does. But an exploratory approach is different from the standard approach followed in the bulk of social science research. In many social science quantitative empirical studies, data analysis is used as proof. For example, data analysis is conducted to prove the validity or applicability of theories or both. The starting point for such a study is the theory. This is not to say that data play no role in the study because the availability of data and the nature of the data ultimately drive all data analyses. But the main objective of this type of theory-driven study is to put the theory to a test. An exploratory approach is different from this standard practice as the data analysis centers on the data. The starting point for such a study is the data. This is not to say that theory plays no role in the study because the study is nonetheless built on prior research studies that tested or generated theories concerning the data. But the objective of the data-driven study is to discover what can be found in the data. The data, instead of the theory, dictate the setup and the implementation of a data-driven study. If a theory-driven study is a focused search, a data-driven study will be a wide-open search. In other words, the data-driven nature of an exploratory study is to put aside as many preconceived notions of what can be found in the data as possible and let the data tell the story. Daniel Schneider, who will be cited extensively later in the dissertation, alluded to the mindset for this kind of exploration in one of his articles.²

² Even though Schneider did not say explicitly that he set out to conduct an exploratory data analysis, his approach is exploratory in nature. In his 2002 article, he said: “Lack of expectation about results of the research is one way in which to reduce bias, and so I began without a preconceived idea about the outcome

Due to the data-driven nature of exploratory data analysis, the issue of data availability places limits on the questions that can be asked. As no suitable dataset on Canadian income tax cases and the socio-demographic characteristics of judges who decided the cases was found, original datasets were compiled by converting textual information from cases and official judicial biographies into numbers in datasets for data analysis. As answers to questions that can be provided by quantitative data analysis is limited by the information contained in the dataset, it is not feasible to ask questions that cannot be answered by the numerical data available. Thus the questions are a function of the kind of information that can be represented in numbers in the datasets developed specially for this dissertation.

The exploration in this dissertation is of a two-stage process. First, statistical models on judicial decision making based on the historical data of Tax Court of Canada and Supreme Court of Canada were developed. Second, the models were applied to develop judicial decision making scenarios based on data of the current judges of the two courts. According to the analyses of historical data, Tax Court of Canada judges who are more likely to vote for taxpayers may include those who went to universities outside Canada, served on the bench prior to their appointment to the Tax Court of Canada and taught law on a part-time basis before. Tax Court of Canada judges who are more likely to vote against taxpayers may include those who were appointed by prime ministers from the Liberal Party and taught law on a full-time basis. As a crude summary, Supreme Court of Canada justices who are more likely to vote for taxpayers may include those

of my analysis.” See Assessing and Predicting Who Wins, *infra*, note 106 at 493.

who taught law before, and in cases with a lot of legal ambiguity, those who worked outside Ontario and Quebec. Supreme Court of Canada justices who are more likely to vote against taxpayers may include those who attended universities outside Canada and those who served as trial judges. One of the broad findings of the dissertation is that taxpayers are found to be more likely to win in the current Supreme Court of Canada than in the current Tax Court of Canada based on simulated voting scenarios built on the socio-demographic characteristics of judges. As the simulated voting scenarios are built on past voting records of judges, the implicit assumption is that the past provides a partial glimpse of the future. According to the exploratory data analyses in this dissertation, the same socio-demographic traits led to different voting behavior in different courts, signaling that other non-socio-demographic variables are at work. That calls for future research.

The rest of the dissertation proceeds as follows. Section 2 reviews the literature on prior quantitative research on judicial decision making. Section 3 presents the findings of an exploratory data analysis of the influences of selected socio-demographic characteristics of justices in their decision making in the Supreme Court of Canada in 1920-2003. The reason why the Supreme Court of Canada data were modeled first partly because each case was decided by a panel of justices and the associated complexity informed the modeling process. Section 4 applies the modeling approach used in Section 3 to explore the influences of selected socio-demographic characteristics of judges in their decision making in the Tax Court of Canada in 1983-2004. Section 5 reflects on the research outcomes of the exploratory data analyses on judicial decision making.