

5 Reflecting on Quantitative Analysis of Judicial Decision Making in Canada

When Peck published his research in the late 1960s, many in the legal profession did not accept his view of the existence of a political dimension in judicial decision making and his mapping of judicial voting patterns in scalogram analysis. Ian Bushnell said that “the bar’s reaction to Peck’s work bordered on the hysterical.”²²⁴ Peck’s focus on judges’ ideologies, coupled with the use of a quantitative technique, were too unorthodox at the time. Donald Fouts, a contemporary of Peck and a fellow scalogram user, commented in a 1969 book that “Canadian scholars have made few systematic efforts to examine the Court’s voting behavior in various policy areas or to suggest theories to explain what kinds of personal attitudes are operative in particular cases.”²²⁵ The main objection to Peck’s research that linked law and politics then was that such work undermined the public confidence on the integrity of the judiciary.²²⁶ Now few would argue that the law and judicial decision making have nothing to do with the

²²⁴ Ian Bushnell, *The Captive Court: A Study of the Supreme Court of Canada* (Montreal and Kingston: McGill-Queen’s University Press, 1992) at 373.

²²⁵ See *supra* note 32 at 264.

²²⁶ See Philip Slayton, “A Critical Comment on Scalogram Analysis of Supreme Court of Canada Cases” (1971) 21 U.T.L.J. 393. Slayton toned down his attacks on scalogram analysis after he had talked to Peck. In a subsequent article, Slayton said he agreed with Peck that in his previous article he did not distinguish between the use of scalogram as a descriptive device and the use of scalogram analysis as an explanatory device of judicial attitudes. See Philip Slayton, “Quantitative Methods and Supreme Court Cases” (1972) 10 Osgoode Hall L.J. 429 at 434, footnote 27.

politics of judges, but more work still needs to be done to advance the knowledge on judicial behavior in Canada.

In Section 2, prior quantitative studies in judicial decision making are shown to have contributed to the understanding of the five models of judicial decision making that has emerged from American political science research and paved the way for future studies on judicial decision making in Canada. To be sure, no one model can explain judicial decision making completely. More realistically, a combination of the five models can provide a more nuanced explanation of judicial decision making, and the configuration of such a combination will be a matter of weighting of different components of the five models.

The Canadian quantitative studies reviewed can be seen as different parts of one big empirical research project. The Peck group of studies formulated the research question of whether Supreme Court of Canada justices decided cases based on extra-legal factors and set up the hypothesis that judges voted according to their personal policy preferences. The Russell group of studies offered a description of the nature of data that can be gathered on three things: the operations of the Supreme Court of Canada, the cases decided by the Court and the justices who decided the cases. The Tate group of studies undertook multiple regression analyses of the data to test (1) the hypotheses of the personal attributes model that were similar to the hypotheses of the Peck group; and (2) hypotheses formulated under other theories that explain judicial behavior. Each group of researchers used more sophisticated quantitative techniques than the preceding group. For

example, Fouts, Russell, Tate and Sittiwong all examined some aspects of the difference in voting patterns between Quebec judges and non-Quebec judges, but Fouts used scalogram analysis, Russell used descriptive statistics, while Tate and Sittiwong used multiple regressions. Taken together, the three groups of studies form a lineage of evolution, revealing improvements along the way.

The last part of Section 2 highlights recent quantitative studies on judicial decision making in tax cases. This part of Section 2 reviews, among other research, the pioneer work on the influences of personal backgrounds of judges on their U.S. tax decisions by Daniel Schneider, who has started examining judicial decision making in U.S. tax cases systematically since the late 1990s. Reading his work has led me to believe that an opportunity of making a contribution by conducting similar research exists in the Canadian context. Therefore, I have decided to explore the power to explain judicial decision making in Canadian income tax cases by the judges' personal backgrounds in Section 3 and Section 4.

5.1 Reflections on Socio-demographic Characteristics of Supreme Court of Canada Judges and Their Decision Making

Although some researchers have published quantitative studies on Canadian judicial decision making, the exploratory data analysis in Section 3 is the first of its kind in Canada in three aspects. First, selected socio-demographic characteristics of Canadian judges are tested together for the first time to ascertain their explanatory power of judicial

decision making. Second, the test is conducted for the first time on Canadian income tax decisions. Third, the statistical modeling strategies used in testing the explanatory power of the socio-demographic variables are used for the first time in the analysis of judicial decision making in Canada.

In the study period 1920-2003, Supreme Court of Canada justices were influenced by their socio-demographic characteristics in their decision making in income tax cases, especially in cases with a lot of legal ambiguity. Based on the results of the probit regression analyses of historical data, simulated voting patterns of the nine current Supreme Court of Canada justices are produced, and according to the simulated voting patterns, one thing is clear: Supreme Court of Canada justices with similar socio-demographic characteristics may very well decide cases in similar ways and cast votes that form similar patterns.

The finding lends support to the idea of having socio-demographic diversity in the Supreme Court of Canada. The argument goes as follows. Justices with similar socio-demographic characteristics may be more likely to vote in similar than different ways. It is hard to argue once and for all whether that is a good thing. It all depends on the cases. Having a Supreme Court of Canada with justices with more similar than different judicial philosophies and outlooks in life may not be a problem in cases with not much legal ambiguity. But in cases with a lot of legal ambiguity and thus with more room for influences of socio-demographic backgrounds to seep into judicial decision making, such a Court may not be able to explore all the points of views that may need to be explored

for such complex cases because of its socio-demographic homogeneity.

In other words, having a Supreme Court of Canada formed by justices with homogenous socio-demographic backgrounds may hinder the Court's capability in deciding complex cases. The focus here is not to argue that having socio-demographic diversity on the Supreme Court of Canada may enable the Court to decide complex cases in "better" ways, whatever that means. Instead, the focus here is to argue that not having socio-demographic diversity on the Supreme Court of Canada may prevent the Court from deciding complex cases in the best way that a socio-demographically diverse Supreme Court of Canada may be able to do so.

5.2 Reflections on Socio-demographic Characteristics of Tax Court of Canada Judges and Their Decision Making

In Section 4, the exploratory data analysis of judicial decision making in the Tax Court of Canada explores the explanatory power of six sets of socio-demographic variables that were examined in the Supreme Court of Canada exploratory study and seven sets of socio-demographic variables that were not examined in the Supreme Court of Canada exploration. Using the results of multinomial logistic regression analysis, simulated voting patterns of the 25 current Tax Court of Canada judges are generated. According to the simulated voting patterns, taxpayers may be less likely to win in the current Tax Court of Canada mainly because more than half of the sitting judges are likely to vote against taxpayers more often than for taxpayers.

The exploratory data analysis on judicial decision making in the Tax Court of Canada confirms the general finding of the Supreme Court of Canada exploratory data analysis. There are linkages between the voting records of judges and their socio-demographic characteristics. The most important point is not that whether there is a crystal ball in terms of statistic model in predicting judicial decision making or what variable has more explanatory power. Rather, it is the empirical analytical outcome that such linkages exist. To ignore them in trying to make sense of judicial decision making would be a mistake. Like what I proposed based on the results of the Supreme Court of Canada exploration, the linkages between socio-demographic characteristics of judges and their decision making support the idea that not having diversity in judicial appointment may lead to decisions made without full and comprehensive deliberation.

5.3 Limitations of Quantitative Data Analysis of Judicial Decision Making

Section 3 and Section 4 show that an exploratory approach can help advance knowledge on judicial decision making in Canadian income tax cases. However, there are limitations in quantitative analysis of judicial decision making.

Dependent variable. One limitation lies in the proxy for outcomes of judicial decision making. The unit of analysis has been judicial votes rather than rulings in the cases. That begs the question of how accurately judicial votes can reflect complex judicial behavior. Critics of quantitative analysis often say that quantitative analysis of judicial decision making only focuses on outcomes (i.e. judicial votes) and ignore other

important parts of judicial decision making such as the choice of statutory interpretation approach.²²⁷ A group of U.S. researchers have been coding U.S. tax decisions according to the statutory interpretation approaches used by the judges in deciding the cases and developing a dataset for further investigation of questions including whether the choice of statutory interpretation approaches influence the outcomes of the cases.²²⁸ Statutory interpretation should definitely be included as a variable in future datasets on Canadian judicial decision making.

Independent variables. Another limitation is about the content of the datasets used. Quantitative analysis of judicial decision making often focuses exclusively on judges and pays little attention to other public policy actors in the judicial decision making process including interest groups, politicians and the news media. A thorough understanding of judicial decision making will not be reached without a detailed understanding of actors in the judicial decision making process other than judges. For example, lawyers play a significant role in the adjudication process. Lawyers are supposed to illuminate the legal issues in disputes with their advocacy skills and facilitate

²²⁷ For a recent discussion on the focus on the outcomes rather than the laws in cases in quantitative research on judicial decision making in the U.S., see Lee Epstein, Nancy Staudt, and Peter Wiedenbeck, “Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code” (2003) 13 Wash. U.J.L. & Pol’y 305 at 322–323.

²²⁸ See Lee Epstein, Nancy Staudt, Peter Wiedenbeck, “Judging Statutes: Thoughts on Statutory Interpretation and Notes for a Project on the Internal Revenue Code” (2003) 13 Wash. U. J.L. & Pol’y 305. Also, see a forthcoming Loyola-L.A. Law Review article by Nancy Staudt, Lee Epstein, Peter Wiedenbeck, Ren’e Lindst’adt & Ryan J. Vander Wielen entitled “Judging Statutes: Interpretive Regimes” at <http://www.lawprofessorblogs.com/taxprof/linkdocs/Nancy%20Staudt%20on%20Judging%20Statutes.pdf>.

the court to arrive at a just decision. Lawyers may make or break a case for their clients. Noting that lawyers make “a big difference,” Bowman, then Associate Chief Justice of the Tax Court of Canada, said in 2002 that “[i]n perhaps 20 or 25 percent of cases that can go either way, counsel do make a difference. I can tell you that there are some counsel with winning cases who have managed to snatch defeat from the jaws of victory; that has often happened.”²²⁹ In future quantitative analyses there should be ways to incorporate their role in the dataset, given the availability of more resources for dataset development. One possible way is to use the experience of lawyers as a proxy of the capability of the lawyers and to answer the question on whether more experienced lawyers are more likely to win in courts. But of course, no matter what the lawyers do, the judges decide the cases, and that leads back to the role of judges in judicial decision making. Bowman said “if you're going to get Mr. Justice Jeffrey of the Bloody Assizes or Mr. Justice Ivan the Terrible, you are going to prepare your case one way. If you're going to get Mr. Justice Milquetoast, you're going to prepare it differently. You look up his cases.”²³⁰

Modeling. Another limitation is about the level of details in modeling. The current body of quantitative analyses of judicial decision making is mainly static in nature. As all cases are treated the same way over a period, the modeling cannot capture the differences

²²⁹ *Supra* note 202 at 5.

²³⁰ *Ibid.* at 14.

in the jurisprudential importance of cases and temporal changes in judicial behavior.²³¹ For example, all cases are treated the same statistically for data analysis in the exploratory study of judicial decision making in the Tax Court of Canada in this dissertation. In future research, such an analysis can be improved by categorizing the cases that feature self-represented taxpayers differently. Furthermore, cases may be coded on a weighted scale to reflect their relative importance.

Nature of Quantitative Analysis. The most glaring limitation of quantitative analysis of judicial decision making is due to the inherent limitation of quantitative analysis itself in examining judicial decision making. Some things can never be learnt by doing quantitative data analysis alone. Here is just a partial list of questions that can be difficult to answer by quantitative analysis alone.

- The Supreme Court of Canada was shorthanded due to illnesses and absences in the 1980s.²³² Did that affect its judicial decision making?

²³¹ For a recent discussion on problems with the implicit assumption that all cases are of similar importance in the development of law in quantitative research on judicial decision making in the U.S., see Gregory C. Sisk, Michael Heise, and Andrew P. Morriss, “Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning” (1998) 73 N.Y.U.L. Rev. 1377 at 1392–1394.

²³² See Wilson, *supra* note 126, at 155:

Part of the difficulty of managing the Court during the Laskin era and even after 1984 when Dickson replaced him as chief justice was related to illness and absences of judges. For a long period of time the Court was not functioning with its full complement.

See Dickson, *supra* note 188, at 375:

In the early 1980s, it was Laskin and Ritchie. Then Chouinard was struck down with cancer in 1987. Estey was absent for a year on the banking inquiry and then, in the spring of 1987, was again out of commission with a blood clot that damaged his ophthalmic nerve. The more serious