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Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy

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Commentary

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Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy

Abstract

This commentary describes our experiences in trying to undertake a judicial performance evaluation of federally appointed judges in Canada. Some respondents were enthusiastic about the project, but others were strongly opposed to it and worried about the effects that our survey would have on judicial independence. After describing the feedback that we received and the fallout from our project, we examine the relationship between judicial performance evaluation and judicial independence. We argue that a well-conceived judicial performance evaluation does not violate judicial independence. We then explore the resistance to judicial performance evaluation in Canada, using a comparative lens. The explanation for this opposition, it seems, lies partly in the broader socio-political context found in common law jurisdictions with parliamentary systems of government and no judicial elections. In our view, opposition to outside academic inquiry from strong elements within the Canadian legal community also forms part of the answer.

Keywords

Judges—Rating of; Judicial independence; Canada

Commentary

Evaluating Federally Appointed Judges in Canada: Analyzing the Controversy

TROY RIDDELL, LORI HAUSEGGER & MATTHEW HENNIGAR*

This commentary describes our experiences in trying to undertake a judicial performance evaluation of federally appointed judges in Canada. Some respondents were enthusiastic about the project, but others were strongly opposed to it and worried about the effects that our survey would have on judicial independence. After describing the feedback that we received and the fallout from our project, we examine the relationship between judicial performance evaluation and judicial independence. We argue that a well-conceived judicial performance evaluation does not violate judicial independence. We then explore the resistance to judicial performance evaluation in Canada, using a comparative lens. The explanation for this opposition, it seems, lies partly in the broader socio-political context found in common law jurisdictions with parliamentary systems of government and no judicial elections. In our view, opposition to outside academic inquiry from strong elements within the Canadian legal community also forms part of the answer.

Ce commentaire décrit la manière dont nous avons tenté d'entreprendre une évaluation du rendement des juges nommés par le gouvernement fédéral Canadien. Certains répondants se sont montrés enthousiastes quant à ce projet, alors que d'autres y s'y sont fortement opposés en se disant soucieux des effets que notre sondage pourrait avoir sur l'indépendance des juges. Après avoir décrit les commentaires que nous avons reçus ainsi que les répercussions de notre sondage, nous nous penchons sur la relation qui pourrait exister entre l'évaluation du rendement des juges et leur indépendance. Nous faisons valoir qu'une évaluation bien conçue du rendement des juges ne porte pas atteinte à leur indépendance. Nous examinons ensuite la résistance à l'évaluation du rendement des juges au Canada à l'aide d'un prisme comparatif. L'explication de cette réticence réside en partie, semble-t-il, dans le contexte sociopolitique général des régimes parlementaires soumis à la common law où les juges ne sont pas élus. Nous sommes d'avis que l'opposition à une enquête universitaire externe de la part d'éléments vigoureux de la collectivité juridique canadienne fait également partie de la réponse.

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“STUDY ASKING LAWYERS to critique judges sparks firestorm.”¹ When we undertook our research on judicial evaluation, this headline in Canada’s largest national newspaper, the *Globe and Mail*, was not the response we had anticipated. We had asked lawyers to evaluate, anonymously, the professionalism of federally appointed judges for the purposes of measuring aggregate patterns in relation to appointments made after the introduction of federal screening committees in 1988. The strong reaction of a number of legal bodies and individuals and the ensuing media coverage seriously undermined our ability to conduct the research. But perhaps more importantly, our experiences have raised substantive questions about the relationship between judicial evaluation, independence and accountability, and the politics surrounding the judiciary. This commentary explores two such questions: First, does undertaking judicial evaluations pose a threat to judicial independence or to the administration of justice; and second, why, when judicial evaluations are becoming more common in many parts of the world, are they so strongly resisted in Canada?

As described in Part I, our initial attempt at implementing the evaluation stage of our project took a subset of judicial appointments made from 1989–1997 and asked lawyers to evaluate judges before whom they had appeared on a series of factors ranging from knowledge of the substantive law to the judge’s treatment of the parties before the court. Our next attempt was designed to capture a wider population. We asked law societies in each province to alert their members to our study and to provide a link to an online survey. With both rounds of evaluation, our goal was to get a snapshot of the quality of federal appointees to provincial superior courts and to the Federal Court of Canada. We also wanted to test whether appointees who had political connections prior to their appointments

1. Kirk Makin, “Study asking lawyers to critique judges sparks firestorm”, *The Globe and Mail* (4 March 2009) A8.

were rated as highly as those without political connections. Previous research on judicial appointments made by the federal government before 1988 suggested that, on the aggregate, legal insiders tended to accord a lower legal reputation to judges who had a significant political affiliation with the party in power.² More recent research suggests that the new screening committees introduced in 1988 for federal judicial appointments have reduced the number of appointees with major political connections, though only modestly.³ The question of what this has meant for judicial quality has yet to be successfully addressed.

Part I describes our attempt to address this question and the issues our research raised. The project provoked strong responses, both favourable and unfavourable. Some members of the legal community expressed a concern about judicial evaluation and its effect on judicial independence. Others were very supportive of the idea and discounted any impact on judicial independence. To better understand these responses, we follow this first section with an analysis, in Part II, of the relationship between judicial evaluation, judicial independence, and the accountability of the judiciary. After arguing that a properly conducted evaluation of the judiciary would not undermine judicial independence or the administration of justice (and would perhaps even enhance the latter), the commentary then explores, in Part III, why judicial evaluation is becoming more common in many places while in others, particularly Canada, there is resistance to the idea. The answer, in our view, lies partly in the broader socio-political context found in common law jurisdictions with parliamentary systems of government and no judicial elections. For example, in the United Kingdom, though evaluation processes are common for lower court judicial officers, there has been a reluctance to introduce them for the senior levels of the judiciary.⁴ There is nothing inherent in the parliamentary system that would preclude an evaluation process that carefully accounts for issues of independence. However, judicial elections in US states and the civil service model of the judiciary in the civil law systems of continental Europe may encourage evaluation processes more so than parliamentary systems, given that these two methods of judicial selection

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2. Peter Russell & Jacob Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41:1 UTLJ 4. See also Lori Hausegger et al, "Exploring the Links between Party and Appointment: Canadian Federal Judicial Appointments from 1989–2003" (2010) 43:3 Can J Pol Sci 633 at 633.
 3. *Ibid* at 634.
 4. Stephen Colbran, "A Comparative Analysis of Judicial Performance Evaluation Programmes" (2006) 4:1 J Commonwealth L & Legal Educ 35 at 58.

more closely mirror the selection of other governmental actors, who receive feedback on their job performance.

We believe that another part of the explanation is the opposition to judicial evaluation by strong segments of the Canadian legal community. This opposition has been influential enough to shut down attempts at evaluation, and it has not been countered by other powerful forces such as the executive or legislative branches of government, the media, or the public. The opposition to judicial evaluation may be part of a broader resistance to academic inquiry into the legal and judicial systems, driven perhaps by legal professionals' self-interest or their overly-inflated view of themselves as "guardians" of the legal system and community. After exploring these possible explanations, we conclude with suggestions for future lines of investigation into these issues.

I. JUDICIAL PERFORMANCE EVALUATION PROJECT

A. BACKGROUND

In their study of federal judicial appointments from 1984–1988, Peter Russell and Jacob Ziegel found that 24.1 per cent of appointees had "major" involvement with the governing Progressive Conservative Party (as a party official, active participant in an election or leadership campaign, or candidate for elected office) and that 23.2 per cent had "minor" involvement (minor constituency work, financial contributions, or close personal or professional associations with party leaders).⁵ Interestingly, informants in each province tended to rate those appointees with major political connections lower on average than those without major connections.⁶

In response to criticism about the influence of patronage in the judicial appointment process, the federal government introduced screening committees in 1988 to vet judicial candidates.⁷ In their study of judicial appointments from 1989–2003, Lori Hausegger et al found that the screening committees had some

5. Russell & Ziegel, *supra* note 2 at 22.

6. *Ibid* at 23-24.

7. These committees consist of members of the legal community; a member from the judiciary; a representative of the province; lay people; and, since 2006, a representative of the police. When the committee system was originally established, candidates were rated as being either "qualified" or "not qualified." In 1991, these categories were changed to "highly recommended," "recommended," and "unable to recommend." Additionally, at that time, committees were also asked to attach a précis about the candidate. In 2006, the Harper Conservative government revised the ranking system back to a two-tiered system ("recommend" or "unable to recommend").

effect in decreasing the number of major political activists appointed by the federal government. The study showed that 17.2 per cent of appointees had major political connections and 23.6 per cent had minor political connections to the party in power.⁸

Like Russell and Ziegel, Hausegger et al examined the quality of appointees chosen for the bench in terms of the extent of their political affiliations. Respondents were asked to rate the appointees before they became judges. The results, presented in Table 1, below, show a trend similar to that found by Russell and Ziegel. Respondents rated appointees with major past political activities, social or professional connections as “outstanding” only 8.3 per cent of the time—the lowest level of any category. Additionally, many more of these appointees were rated as “poor” or “fair” relative to other categories of appointees. The “no politics” category, a classification not captured in Russell and Ziegel’s study, is perhaps the most instructive. While 32.1 per cent of these appointees were rated as

TABLE 1: QUALITY OF APPOINTMENT BY POLITICAL AFFILIATION 1989–2003

	% of Each Political Affiliation Falling Within Each Rating Category				
	No Politics	Minor Direct Activities	Major Connections and/or Major Direct Activities	Major Connections Only	Major Connections and Minor Direct Activities
Outstanding	32.1%	15.8%	8.3%	13.3%	10.0%
Very Good	33.3%	22.6%	31.8%	24.4%	30.0%
Good	14.1%	12.4%	28.1%	28.9%	30.0%
Fair	0%	1.7%	12.0%	6.7%	10.0%
Poor	0%	0.6%	4.2%	2.2%	0%

SOURCE: From Hausegger et al 2010, reproduced with permission.

outstanding (more than twice as many as any other category), none of them was rated as “poor” or even “fair.”⁹

Although these results are interesting, both studies are limited by the fact that they do not capture the performance of the appointee as a judge, but only the perceived quality of the appointment. Additionally, both studies are based on a limited number of observations from informants who assisted the researchers in determining political connections and who may or may not have personally interacted with the appointees. A more comprehensive evaluation of federally

8. Hausegger et al, *supra* note 2 at 643.

9. They also divided the data to examine the quality of appointees by their appointing prime minister. The differences between former prime ministers Mulroney and Chrétien were not significant.

appointed judges would have two primary benefits: First, it would allow for an analysis of the relationship between political affiliation and quality of judicial performance, rather than perceived quality of appointment (and could be based on the assessment of a number of individuals who had appeared before the judge); second, it would begin to provide an overall picture of the performance of federally appointed judges who had been selected under the new appointment system (using a sample size consistent with available time and resources). As discussed in greater detail in Part II, we believe that such an exercise would benefit the administration of justice in Canada.

B. ROUND ONE AND UNEXPECTED RESPONSES

We constructed questions using existing judicial performance evaluation (JPE) surveys, particularly those conducted in US states such as Connecticut, Hawaii, Maryland, Massachusetts, and Virginia, and a pilot project from Nova Scotia. In addition to the standard questions about legal knowledge, communication skills, fairness, and so on (categorized under the heading of “Evaluation”), we included a separate section of the survey, labeled “Decision-making.” This category contained questions about judicial decision-making tendencies such as whether the judge tended to favour the Crown prosecutor or the accused in criminal cases, “everything else being equal.”¹⁰ Although we intended the questions in this section of the survey to be used for future research on judicial decision making at the trial court level (a vastly understudied area, particularly in Canada) rather than to address whether the judge was “biased,” some respondents may have interpreted the questions as an assessment of whether judges were making substantively “right” or “wrong” decisions. We sent the survey to lawyers who had appeared before the judges in our sample.¹¹

Neither judicial organizations nor law societies were asked to participate in the first round of the study, nor were they forewarned that it would be conducted. Although the imprimatur of these organizations and their resources (particularly

10. See the Appendix for the survey instrument.

11. The judges in our sample were appointed between 1989 and 1997. We chose this time frame to allow for comparisons between appointments made by the Conservative government of Prime Minister Brian Mulroney (1988–1992) and the appointments made by the Liberal government of Prime Minister Jean Chrétien (1993–1997). We were going to compare our results to a study of federal judicial appointments from 1984–1988, just before the new federal appointment system was introduced; see Russell & Ziegel, *supra* note 2. Out of 532 federal appointees in this time frame, we found enough potential evaluators for 369 of them. We found these potential evaluators by having research assistants comb through published decisions in law reports.

lists of contacts) could have made the research easier, we feared that partnering with these groups might interfere with the independence of our inquiry. We did, however, ask several people including lawyers, judges, and staff of one provincial law society to give us feedback on the survey. None of them expressed reservations about the research idea, so we were completely unprepared for the responses we received.

Once the survey went out to potential evaluators, we began receiving feedback almost immediately. Some respondents contacted us directly and others took time to answer the general question about judicial evaluation that we placed at the end of the survey instrument. While some respondents were enthusiastic about the prospect of JPEs, particularly if they were to be used for judicial education purposes that might result in changes on the bench, other responses were less favourable. Some respondents expressed reservations about possible bias amongst the evaluators, arguing that the survey provided an outlet for lawyers with “an axe to grind.” One respondent argued that the evaluations would not necessarily provide a true reflection of the quality of a judge since lawyers “like judges who decide in their favour and are collegial with lawyers.” This may have been what another evaluator was thinking when he suggested that the evaluation process “is no better than having students evaluate professors.”

Some respondents also expressed concern about what we would do with the data. While we had recognized the sensitivity of the information we were asking lawyers to provide and strove to assure them of the confidential and secure treatment that their replies would receive, we were obviously not explicit enough about our plans for the data. Therefore, we modified the information provided to respondents. We had originally told respondents that we planned to examine the aggregate results, that we would not share the results with any organization, and that our findings were intended for academic outlets. We changed this disclosure to state more explicitly that this was an independent academic project, that we would not share the results with any organization, and that we would not publish individual judges’ results.¹²

Some respondents had questions about the funding source we listed—the Social Sciences and Humanities Research Council (SSHRC)—and how closely connected it was to the government of the day. One respondent felt very strongly about this point, stating in an email to us,

12. Some respondents had expressed hope that we would release the individual results. One respondent wrote, for example, “I hope you are doing it on every judge of the Court appointed between 1989 and 2008 and that you publish the data with the applicable data attached to which judge it relates to.”

I assume that you are aware that SSHRC is an appendage of the Government of Canada which can control the ideological bent of those deciding who ought to receive grants. And many people know how to pick a researcher who will entirely independently give you the result you want It is my view ... that this survey is an unwarranted and potentially damaging incursion into a fully independent judiciary bought and paid for by the government of the day... .

After an email exchange, this respondent was largely satisfied with our explanation that SSHRC was an independent government agency and that we would not be releasing individual judges' results to the government or any other organization. However, this individual's initial reply (and some other replies) alerted us to the possibility that the political environment might be influencing reactions to our project. Conservative Prime Minister Stephen Harper had criticized the judiciary in the past, promising to appoint more "law and order" judges.¹³ This comment angered many legal professionals and opposition politicians. Against this backdrop, the fact that we were using federal research funds and were conducting an evaluation of judges, which included questions on decision making in criminal cases, made some respondents suspicious.

Even after we reassured respondents that we were conducting an independent academic study and would not publish individual judges' results, respondents continued to express concern about the act of evaluating judges itself. One respondent asserted that lawyers should never publicly comment on judges and expressed real concern that "negative comments about judges (even through an anonymous survey) might well have a negative impact on the view of the public towards our judicial system." Another respondent, referring to our project, stated that "it's inappropriate—stop doing it—judges cannot respond and surveys like this affect judicial independence." Some respondents inquired whether we had received permission from the Canadian Judicial Council or the Office of the Commissioner for Federal Judicial Affairs. Judicial independence was the most common worry among those who opposed the project. Although the specific threat to judicial independence was rarely stated, some respondents suggested that the survey results could be used to put pressure on judges to decide cases in a particular way or could cause them to attempt to be popular, rather than make necessary but unpopular decisions.

Still, it is worth noting that we had many enthusiastic responses to the evaluation process. One respondent merely wrote "it's about time." Others challenged the concern about judicial independence, arguing that "the judiciary is the last Canadian

13. Clark Campbell, "PM says he'll pick judges who are tough on crime", *The Globe and Mail* (15 February 2007) A1.

institution that is devoid of effective accountability. Too often, reasonable steps to address this are met with cries of the importance of judicial independence.” One respondent suggested that, while he supported judicial independence and “respected the difficult and often lonely job of being a judge ... there is a difference between the independence of the bench and judges being immune from constructive criticism.”

Although we recognized the sensitivity of the information we were seeking, we were unprepared for the depth of feeling we stirred up. Beyond the emails from potential evaluators, we also faced questions from outside parties who had heard of the study. A chief judge in one province contacted us with concerns about what we were doing. We were contacted by various law societies that had received inquiries from their members about the propriety of participating. The Canadian Forum on Civil Justice asked us for information after it received inquiries about the project from lawyers and judges. The Office of the Commissioner for Federal Judicial Affairs requested a copy of the survey instrument. Meanwhile, an assistant deputy attorney general in Ontario reportedly “directed” Crown counsel not to participate in the study.¹⁴ Shortly thereafter the justice reporter for the *Globe and Mail* wrote a story about the study that further aroused the suspicions noted above.¹⁵ The article referred to our project as a “federally funded” study and prominently featured the questions on judicial decision making.¹⁶ After the article was published, the Public Prosecution Service of Canada told its counsel that it was not appropriate for them to participate¹⁷ and our funding source, SSHRC, called to check in on our project. The SSHRC phone call spurred the Research Ethics Board at one of our universities to re-examine our “use of human subjects” application, which it had already approved, in order to ensure that we were operating in accordance with the approval. In light of these events and the likelihood of a skewed sample, we decided to shut down the survey and not to

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14. Near the end of February 2009, we received a number of replies from Ontario Crowns indicating that they had been told by their superiors not to participate. One respondent specifically mentioned that “[t]he direction came from Mr. John Ayre, Assistant Deputy Attorney General. He indicated that it is not the role of a Crown attorney to comment on the judiciary.” This email was communicated on 27 February 2009.
15. The day after the story appeared in the *Globe and Mail*, the paper published a letter to the editor about our project from law professor Jacob Ziegel, who is a prominent commentator on judicial selection. Ziegel expressed support for the project so long as the names of individual judges were not published—the headline for the letter was “Naming names a no-no.” *Globe and Mail* (5 March 2009) A18.
16. Makin, *supra* note 1.
17. We received emails from prosecutors in the Public Prosecution Service indicating that they had been told not to participate in the project.

contact the hundreds of lawyers who had indicated they had experiences with judges that they were willing to share. We suspected that only a vocal minority had serious reservations with the project, but seeing that some individuals were concerned about participating and others were forbidden to do so, we decided that we needed to contemplate other approaches to get a more significant response rate.

C. THE COLLECTION OF EVALUATIONS: ROUND TWO

Our limited response rate in Round One, coupled with the skewed sample that resulted when Ontario Crown counsel and other lawyers were told not to participate in our study, made it necessary to redo our efforts at evaluation. We began the second round with an attempt to address the concerns expressed during Round One. First, we deleted the separate section of the survey on judicial decision making to avoid any inference that we wanted to track how individual judges decided cases. Second, in order to reassure judges that we were conducting an academic study, not launching an attack on the judiciary, we sent a letter to the Canadian Judicial Council and the Commissioner for Federal Judicial Affairs informing them of our project and providing them with assurances as to our goals. In the letter, we made it clear that we were conducting independent academic research, unaffiliated with any group or party. We also emphasized that we would be reporting aggregate data, not releasing any individual judges' results (although we indicated that we would be willing to let judges see their own overall average results for professional development purposes).

Finally, we took a different approach to recruiting evaluators. In an attempt to be more inclusive, we sent letters to law societies in eight of the provinces (leaving Quebec and New Brunswick for a later time when we could conduct the survey in French). These letters sought to convince the law societies of the importance of our research and to reassure them as to our goals and methodology. Additionally, we asked the law societies if they would send an email to their members alerting them to the study and including a link to our survey—or at least making the link available on their website so that interested members could participate.

We chose to recruit respondents through the law societies in the second round with the goal of reaching a far greater number of lawyers and increasing the response rate for our survey, which would, of course, help make our results more robust. By allowing lawyers to self-select into the survey we also expected to avoid one of the other hurdles that cropped up occasionally during the first

round—respondents indicating that they did not have a good enough recollection of the judge to provide a meaningful evaluation.¹⁸

Furthermore, we hoped that the law societies' support would calm some of the fears about the study. We recognized that seeking law society support might have the disadvantage of appearing to tie us to these organizations, inviting questions of what use the law societies might make of the data. In Round One, some respondents raised this issue in the general question near the end of the survey that asked whether law societies should be used to distribute the survey more broadly. These respondents worried that the law societies would thereby gain access to the data and that they "would not preserve the confidential nature of the survey." With this in mind, we carefully drafted an introduction to the survey that reassured participants that we were independent academic researchers and that we would not share the data with any organization.

Another concern we had with this second approach was that some lawyers distrust their law societies. One of our earlier respondents suggested that law societies have "too many biases and other motivations and agendas." Another argued that "law societies have been instruments of secrecy and blatant support for the judiciary, no matter the abuses and incompetence. They are classic examples of powerful monopolies that themselves, are not accountable to anyone, least of all their members." Thus, while involving law societies may confer some legitimacy on the project in the eyes of some respondents (particularly those who contacted their law society upon receiving our first survey to check the propriety of answering it), we were aware that such involvement might also expose us to other concerns and alienate some potential respondents.

D. RESPONSE

In the end, only two provincial law societies agreed to alert their members to the study. When the law societies of other provinces did not respond after a follow-up email, we then emailed the provincial affiliates of the Canadian Bar Association (CBA). Most of these organizations did not respond to our requests and, of those that did, none replied positively.

Although we did not receive much feedback from the provincial legal organizations—and no response from either the Federal Commissioner for Judicial Affairs or the Canadian Judicial Council—we did get a blistering letter

18. Of course, a difficulty with this approach is that there is no way to ensure that lawyers evaluating a particular judge have actually appeared before that judge. However, we do ask how many times they have appeared before the judge (in various forums such as trials or pre-trial conferences).

from the CBA itself. In that letter, the organization expressed concern that our research risked “undermining public confidence in the Canadian judiciary and the Rule of Law itself.” There was some confusion that we were attempting to correlate the ratings of judges with which party they supported, thus threatening judges’ freedom to support the political party of their choice.¹⁹ The CBA was also concerned that we would be unable to get unbiased evaluators because fifty per cent of those appearing before the judges—counsel for the losing parties—would be “less than complimentary” to the judge involved in their case. Finally, the association expressed concern about the impact the release of our “dubious findings” would have on the public’s respect for the judiciary. As one might expect from these reactions, our second attempt at evaluation yielded very few responses.

II. THE ISSUES RAISED BY ATTEMPTS TO EVALUATE JUDGES

Efforts at judicial performance evaluation have met with questions about the research methodologies used, the fairness of the process, and whether the practice violates judicial independence or provides an appropriate balance between independence and accountability.²⁰ Our experiences certainly demonstrated people’s concerns about all of these issues and, in fact, highlighted another contentious question: Does research into JPE undermine or improve the administration of justice or the rule of law?

In terms of research methods, the possibility of bias was raised by various respondents and is a concern in relation to JPE studies more generally. We believe that not all respondents will be influenced by their win/loss record, just as not all students evaluate their professors according to the grade they received. Nevertheless, steps must be taken to mitigate the possibility of biases distorting the results.

19. The CBA may have learned that, as part of our research, we wanted to assess whether a judge’s degree of partisan affiliation prior to appointment (such as donating to a party or running for office) was inversely correlated with their quality. However, even if this was the case, the CBA misconstrued the intent and the effects of our research.

20. Theodore C Koebel, “The Problem of Bias in Judicial Evaluation Surveys” (1983) 67:5 *Judicature* 224; Kevin M Esterling & Kathleen M Sampson, *Judicial Retention Evaluation Programs in Four States: A Report with Recommendations* (Chicago: American Judicature Society, 1998); Rebecca Wood & Sylvia R Lazos, “Reflections in Response to the Nevada Judicial Evaluation Pilot Project” (University of Nevada Research Paper 10–36, 2009), online: <<http://ssrn.com/abstract=1650764>>; Jean E Dubofsky, “Judicial Performance Review: A Balance Between Judicial Independence and Public Accountability” (2007) 34:1 *Fordham Urb LJ* 315.

These steps include making the survey accessible to different types of lawyers and achieving as large a sample size as possible for each judge, given time and resource constraints. There are also methods to reduce the impact of outlying responses, such as eliminating the highest and lowest scores for a judge and using median, rather than average, scores.

Questions about how we would disseminate our results straddled concerns about our research methods and concerns for judicial independence and the administration of justice. As indicated above, there were fears that if we published individual judges' results, the judges would not have the opportunity to respond, they might feel pressure to decide cases in a certain way, and the administration of justice might be compromised by negative judicial reviews. Conversely, some encouraged us to publish individual results. Still others hoped that the results would be given to a judge's administrative superior to improve the quality of the justice system but would not be disseminated publicly.

We did not believe that publishing the individual results would violate judicial independence because security of tenure, financial security, and administrative independence would still buttress a judge's ability to make impartial decisions. Indeed, in surveys of state judges in the United States, only a minority of respondents believed that the JPE process—complete with the publication of individual results—undermines judicial independence.²¹ As we began the process, therefore, we debated the possibility of publishing individual judges' results.²² We decided against it because we were concerned that it might not be fair to publish results for some but not all federally appointed judges.²³ Furthermore, publishing individual results was not necessary to address our two research goals: (1) assessing whether the inverse relationship found by Russell and Ziegel and Hausegger et al between the "legal reputation" of appointees and their partisan affiliation with the party in power still held true while using a more rigorous methodological approach;²⁴ and (2) analyzing the quality of appointments made

21. David C Brody, "The Use of Judicial Performance Evaluations to Enhance Accountability, Judicial Independence, and Public Trust" (2008) 86 Denv UL Rev 115 at 143; Kevin M Esterling & Kathleen M Sampson, *Judicial Retention Evaluation Programs in Four States: A Report with Recommendations: Executive Summary* (Chicago: American Judicature Society, 1998) at 5.

22. We had no intention, though, of giving the results directly to administrative judges as some respondents had hoped. However, we were willing to share a judge's overall result with him or her upon request, for professional development purposes.

23. Recall that to make the study manageable, we were only evaluating judges appointed between 1989 and 1997. Additionally, for a number of these judges, we could not find enough potential evaluators to keep them in the sample.

24. Also, though we were using a more rigorous methodology than the one used by Russell

under the new appointment system, which was promoted as a way to improve the selection process and reduce the influence of patronage through the use of screening committees. As the unexpected controversy intensified, we changed the survey's introduction to make it much more explicit that we would not publish individual judges' results, nor would we give them to any organization.²⁵

Having this more explicit wording in the second round of surveys, in addition to dropping the section on decision making, likely helped reduce the degree of opposition that we faced. Also, inviting lawyers to participate through their respective law societies in the second round, rather than simply sending out emails to individual lawyers, increased the chances that respondents would be favourably inclined toward the evaluation process. Nevertheless, uptake by lawyers was not as strong as we would have liked. And, in addition to the refusals of most official organizations to assist us with our survey, we still faced opposition to the project, as exemplified by the CBA's letter to us.

The varied reactions to the project, from vociferous opposition to enthusiastic support, led us to undertake a systematic examination of the relationship between JPE, judicial independence, and accountability. This analysis is presented in the next section of the commentary.

A. INDEPENDENCE, ACCOUNTABILITY, AND ADMINISTRATION OF JUSTICE

In its 1985 *Valente* decision, the Supreme Court of Canada outlined three requirements of judicial independence that would allow judges to decide cases impartially: job security, financial security, and administrative control over functions related to the performance of the judiciary.²⁶ Although subsequent court decisions have clarified or expanded these foundational concepts²⁷ and McCormick has noted some additional preconditions of judicial independence in the Anglo-American context,²⁸ the *Valente* criteria remain fundamentally unchanged.

and Ziegel to evaluate appointees from 1980–1984, we were not certain about how many responses we would need for each judge in order to feel confident about publishing individual results.

25. The *Globe and Mail* article covering our project picked up on our debate about whether to publish individual results, but did not highlight our final decision. This had the unfortunate result of implying that we were still considering publishing individual results. Makin, *supra* note 1.
26. *Valente v The Queen*, [1985] 2 SCR 673 at paras 27, 40, 47, 24 DLR (4th) 161.
27. *Provincial Judges Assn (Manitoba) v Manitoba (Minister of Justice)*, [1997] 3 SCR 3 at paras 118-24, 150 DLR (4th) 577.
28. See Peter J McCormick, "New Questions about an Old Concept: The Supreme Court of Canada's Judicial Independence Decisions" (2004) 37:4 Can J Pol Sci 839. McCormick

Existing in “natural tension” with judicial independence is the desire to keep justices accountable.²⁹ The questions of how judges should be held accountable, and to whom, have implications for JPE and are the subject of a range of perspectives. On the question of to whom judges should be accountable, possibilities range from the legal profession (particularly the judiciary itself), to litigants, to the broader public and the public’s elected representatives.³⁰ Possible mechanisms for judicial accountability can vary from indirect—such as norms regarding the judicial role and societal attitudes—to direct—such as appellate review, disciplinary hearings, administrative incentives and disincentives and, in the United States, retention elections. Where JPE is placed along these continua will depend on the types of questions asked, who conducts the JPE, how it is conducted, how widely the results are distributed, and what kinds of consequences, if any, will result from the evaluation.

JPE projects initiated by the political branches of government—especially ones that include indicators of substantive decision making and have potential consequences for particular decisions—would pose the greatest threat to judicial independence. For example, proposals in the 1990s by some provincial Progressive Conservative Party backbenchers in Ontario would have imposed JPE measures on provincial court judges (including their sentencing practices in criminal cases), would have authorized evaluation of decisions in particular cases, and would have allowed a legislative standing committee to recommend to the attorney general a judge’s removal from office on the basis of a JPE report. Not surprisingly, these proposals failed in the face of concerns over judicial independence.³¹

Conversely, some arguments that JPE is unnecessary and undesirable appear to be based on an unduly limited notion of accountability. This notion suggests that review by appellate courts and disciplinary proceedings by the Canadian Judicial Council (CJC) are adequate—and indeed the only legitimate—channels for oversight of judges. However, it should be noted that the CJC’s oversight is

noted two additional implied elements of judicial independence from the British tradition: judges are drawn from an aggressively independent legal profession and the use of formalism (*ibid* at 841-42). He goes on to discuss the “novel” elements that have subsequently been added by recent Canadian judicial decisions, such as the requirement of having a judicial salary commission (*ibid* at 847).

29. M L Friedland, *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canada Communication Group, 1995) at 2.

30. Stephen B Burbank, “Judicial Independence, Judicial Accountability and Interbranch Relations” (2007) 95:4 *Geo LJ* 909 at 912.

31. See Derek Matisz, “Appointment of s.92 Judges in Canada” (MA major research paper, University of Guelph, 2005) [unpublished].

narrowly focused on investigating complaints concerning serious accusations of judicial misbehaviour. Likewise, the capacity for appellate review to correct errors in the lower courts is quite limited. Not only are most cases never appealed, but many judges on the highest appellate courts see their primary role as jurisprudential development rather than error correction and are more likely to deny leave to appeal if the sole basis for appeal is to correct an error.³² Moreover, review by appellate courts is a much more limited form of evaluation than that envisioned by proponents of JPE. Appellate review and CJC oversight are not designed to assess, on an ongoing basis, a variety of important qualities such as a judge's legal knowledge, demeanor towards parties and staff, communication skills, timeliness of decision making, and fairness. Mechanisms for feedback and accountability become even more important because of the long tenure that federally appointed judges enjoy.³³

The Ontario backbenchers and those arguing against any form of JPE represent the extremes of the continuum. Indeed, most respondents in both rounds of our study and the participants in the pilot project in Nova Scotia in the mid-1990s were favourably disposed towards JPE in the context of professional development or as an academic study of the judiciary and did not view evaluation as a threat to judicial independence. Dale H. Poel reports that most of the Nova Scotia court judges who (voluntarily) participated in the JPE pilot project did not think that the evaluation process threatened judicial independence. He notes, however, that the project was carefully advertised as a method of promoting "judicial self-improvement" in order to avoid such concerns (and only the judge and a voluntary mentor saw the results). A vast majority (over ninety per cent) of the lawyers who took part in the Nova Scotia project, according to Poel, did not believe that the assessment infringed on judicial independence but instead favoured the periodic use of evaluation questionnaires.³⁴

The lawyers who responded to our survey in Round Two were almost unanimously supportive of our approach to JPE, in which the aggregate results of the survey would be used in academic publications and the individual results would be given to judges upon request for professional development purposes but not otherwise disclosed outside the research team. The majority of respondents in

32. See Brian A Crane & Henry S Brown, *Supreme Court of Canada Practice 2000* (Toronto: Carswell, 1999) at 26; Ian Greene et al, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lorimer, 1998) at 106-10.

33. Rebecca Love Kourlis & Jordan M Singer, "A Performance Evaluation Program for the Federal Judiciary" (2008) 86:1 Denv UL Rev 7 at 22.

34. Dale H Poel, "What do lawyers think about judicial evaluation? Responses to the Nova Scotia Judicial Development Project" (2005) 10:2 Innov J: Pub Sec Innov J 10 at 8-9.

Round One were supportive of JPE by lawyers and other stakeholders as well, though a significant minority expressed concerns about judicial independence. Some respondents specifically stated that they would be in favour of JPE only if it were used for professional development.³⁵

In both rounds, some respondents suggested that judges needed to be evaluated and that the results should be made known to their administrative superiors. Others went farther and argued that the individual results ought to be made public. Whether a wider distribution of the data, with possible consequences such as more training mandated by an administrative judge or general public displeasure, violates judicial independence depends on whether the JPE instrument is neutral in terms of judicial decision making. This issue, in turn, raises the question of what is considered neutral. A critical requirement of neutrality is that questions must only be asked about the process of judging (from legal knowledge to communication skills to fairness of treatment), not about the substance of decisions. Although it is possible that a particular respondent's evaluation of a judge on matters such as fairness or the ability to apply the law to the facts may be coloured by a specific decision, or even by the judge's general decision-making tendencies, surveying multiple respondents should dilute the effects of any consideration of substantive decision making on the survey results. Rebecca Love Kourlis and Jordan M. Singer argue that a system of JPE that focuses on process can actually enhance the ability of judges to make unpopular decisions because such decisions are placed in the larger context of whether the judge is considered to be a good listener, fair, knowledgeable, and free from bias.³⁶

Some commentators, however, argue that even process-oriented questions can interfere with how judges ultimately perform their judicial function. Justice Gregory Geason, an Australian judge, argues against judicial evaluation on the ground that anything that constrains a judge beyond precedent or statute violates judicial independence.³⁷ By way of example, he asks whether a judge who interrupted the parties frequently to identify key issues and reduce irrelevancies might suffer on an evaluation compared to a judge who placed more emphasis on letting the parties be heard. This is not a concern to be dismissed lightly, but it should be noted that Justice Geason acknowledges the general importance of

35. As noted above, some of these responses may be attributable to the inclusion of questions about judicial decision making in the survey instrument (though they were not intended as part of the evaluation aspect of the survey) and from us not repeatedly emphasizing clearly enough that we only intended to publish aggregate results.

36. Kourlis & Singer, *supra* note 33 at 21.

37. Gregory Geason, "A flawed proposal for judges," *Lawyers Weekly* (19 October 2007) 20.

judges acting with diligence, intelligence, and courtesy.³⁸ Judges with different styles could still score well on any indicator—a judge who interrupts parties, for example, could do so with appropriate respect. Moreover, the existence of multiple indicators means that a judge's overall evaluation is not determined by any one characteristic. Also, surveying multiple respondents would help to reduce the possibility of systematic biases being introduced into the results, an outcome that could directly or indirectly influence judicial independence. In principle, we do not believe that a wider release of results from a process-oriented JPE would impinge upon job security, financial security, or administrative control over functions related to the performance of the judiciary, the three key elements of judicial independence identified earlier in Part II.

Would our conclusion be different depending on who conducted the JPE? Stephen Colbran, for instance, argues that any JPE project conducted by the executive branch of government would violate judicial independence.³⁹ Lord Taylor, the former British Lord Chief Justice, argues that any formal appraisal system for the judiciary would also threaten judges' independence from one another.⁴⁰ Neither position necessarily offers a compelling logic if the JPE is conducted appropriately (for example, by not evaluating the substantive outcomes of decisions). However, optics are important to the administration of justice—even the appearance of governmental interference with judicial independence needs to be avoided. As a result, if JPE is to be used for more than just professional development, where only the evaluated judges would see their own results, then it might not appear appropriate for a state actor (the executive or possibly even administrative judges) to administer the JPE system.⁴¹ A transparent JPE committee system with representation of various stakeholders, which may include the Office for Federal Judicial Affairs, members of the judiciary, law societies, and the public, would be more compatible with the concept of judicial independence, at least in appearance. This arrangement would be similar to some JPE committees in the United States. It would also be analogous to existing structures in Canada that deal with such issues as financial compensation and court administration. By allowing multiple perspectives into the process, such a committee structure would not only enhance the legitimacy of JPE but could also lead to tangibly better JPE processes.

38. *Ibid* at 21.

39. Colbran, *supra* note 4 at 61.

40. *Ibid* at 57.

41. McCormick, *supra* note 28 at 847-49. This author notes that an emerging principle of judicial independence has been independence from administrative judges.

Of course, if a JPE committee system were established, policies would have to be created to determine how results would be used. Reasonable people will disagree about what these policies should be. A middle-ground approach might be to release an annual public report containing the aggregate data (such as how many judges were ranked from poor to excellent on each indicator) and to provide the individual results to the judge and his or her administrative superiors. This approach could be coupled with the potential for some modest yet direct consequences, such as more training, based upon a judge's results.

However, in the absence of a formal JPE system, we believe that it is appropriate and important for other actors, such as academics and the media, to conduct this kind of research on the judiciary. As we explained in our response to the CBA:

The data may very well show that most of the judges evaluated are very highly regarded. If the data show otherwise or suggest that there is some room for improvement in certain aspects of the judicial role, then perhaps steps could be taken to address such issues and further strengthen the judiciary. We see our research as enhancing rather than threatening the rule of law (and the administration of justice).

Given that many other countries in the world have introduced systems for JPE, what might explain the resistance to the concept in Canada? That question is explored in the following section.

III. EXPANSION OF JPE IN MANY PLACES, WHY NOT CANADA?

Our call for the introduction of JPE in Canada, at both the federal and provincial levels, needs to be placed in the context of the growing interest in evaluating courts and individual judges around the world. Reasons for this interest include frustration over a lack of timely access to justice; the growing policy importance of courts, particularly through their application of constitutional and legislative rights documents; and the rise of the “new public management,” which aims to make government bodies more efficient and responsive to “clients.”⁴² These factors are at work in Canada as well, as evidenced by evaluations of court management in some provinces, such as Ontario's Justice on Target project.⁴³ So

42. European Commission for the Efficiency of Justice (CEJEP), *Monitoring and Evaluation of Court Systems: A Comparative Study* (Council of Europe, 2008); Pim Albers, “Assessment of Court Quality: Hype or Not” (2009) 1:1 Hague J Rule of L 53.

43. The Justice on Target project publishes statistical information about criminal case processing times in Ontario courthouses as part of a larger effort to improve the efficiency and effectiveness of the criminal courts in Ontario. See *Justice on Target*, online: Ontario Ministry

what explains the resistance to the idea of evaluating individual judges, and even to a JPE study conducted by academics?

Part of the answer may lie in the broader socio-political context. In civil law countries where entry to and advancement in the judiciary somewhat parallels the process of the civil service, even if evaluations are conducted largely by judges, the concept of JPE may be less foreign. In the United States, institutional drivers not present in Canada, namely judicial elections, contribute to the acceptance of JPE. The political values that undergird retention elections (skepticism about government authority and support for institutional checks and balances) help to explain the relatively higher demand for judicial accountability and the use of JPE in the United States. The political culture in Canada, traditionally considered more deferential to authority than that in the United States,⁴⁴ provides a less welcome context for JPE by emphasizing independence over accountability.

The reluctance to adopt JPE in countries like Canada, Britain, and Australia, compared to its acceptance elsewhere, suggests that broader cultural and institutional forces, both legal and political, can help to explain the decision whether to adopt JPE. However, this is not a complete explanation. Pilot JPE programs in Canada and Australia, the evaluation of lower courts in the United Kingdom, and various British commissions' calls for more systematic evaluation of judges all suggest that JPE is not completely foreign to the British parliamentary tradition.⁴⁵ As we argued in Part II, there are ways of implementing JPE in a parliamentary system that would balance independence with accountability and professional development. Moreover, the differences in the timing and substance of JPEs within civil law systems and in the United States (some states do not have JPE, nor is there a JPE system for federal judges) indicate that more micro-level factors, such as group politics, are involved as well. In Canada, legal elites appear resistant to the concept of JPE. The major bodies representing lawyers and judges in Canada may not necessarily always be opposed to reform,⁴⁶ but they do seem reluctant to embrace change, particularly if it is proposed by those outside the legal community.⁴⁷ These organizations see themselves as guardians of the legal

of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/jot/default.asp>>.

44. See e.g. Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (New York: Routledge, 1990).

45. Colbran, *supra* note 4 at 56. Colbran notes that both the 1992 report by the Committee on the Judiciary (for England and Wales) and the 1993 Royal Commission on Criminal Justice (Runciman Report) recommended having more formal appraisal systems for judges.

46. For example, see the CBA's call for changes to the federal judicial appointment process. Canada, Canadian Bar Association, *Federal Judicial Appointment Process*, (Ottawa: 2005).

47. However, even changes from within the legal community can generate a negative reaction.

profession. As noted above, some of their members argued that our survey was ill-advised because it could produce negative findings that, in turn, would undermine the administration of justice. While we gratefully acknowledge the help that a couple of law societies provided, our overall experience with this project seems congruent with some respondents' sentiments that lawyers' associations in Canada tend to be powerful and resistant to greater transparency.

Beyond specific objections to JPE, it is possible that respondents' reactions are part of the Canadian legal establishment's broader suspicion towards academic inquiry into the judicial system.⁴⁸ Forty years ago, for example, Sidney Peck was criticized for studying the individual voting patterns of Supreme Court of Canada judges.⁴⁹ More recently, in 2009, the Executive Legal Officer of the Supreme Court of Canada issued a directive to all former law clerks of the Court not to participate in a survey sent to them by professor David Weiden—a directive some clerks considered overly broad and counter to the goal of helping Canadians better understand how an important public institution operates.⁵⁰ In 2012, the chief justice of the Ontario Court of Justice sent a memo to judges asking that they not participate in a confidential survey about criminal case processing times prepared by a Ph.D. student in Political Science at the University of Guelph. The Ministry of the Attorney General of Ontario also refused to allow Crown lawyers and court administrators to participate in that study.

This is not to say that there has never been cooperation from the legal establishment in an academic study of the judiciary. Appellate court judges, for instance, participated in surveys and interviews for Ian Greene's frequently referenced book *Final Appeal: Decision-making in Canada's Courts of Appeal*.⁵¹ Additionally, Emmett Macfarlane's book about the Supreme Court of Canada, *Governing from the Bench*, is based on interviews with current and former justices, former law clerks, and staff.⁵² However, these examples seem to be exceptions

Provincial law societies unsuccessfully lobbied Canadian Lawyer magazine not to publish an article in its May 1989 edition that listed the best and worst judges in Canada. This evaluation was based primarily on surveys filled out by lawyers. Nora Underwood, "Rating the Judiciary: A magazine's gradings cause controversy," *Maclean's* (22 May 1989) 56.

48. We thank one of the anonymous reviewers for the idea to place our experiences into a broader context and for supplying the Peck and Weiden examples.

49. S R Peck, "The Supreme Court of Canada, 1958–1966: A Search for Policy through Scalogram Analysis" (1967) 45 *Can Bar Rev* 666.

50. Cristin Schmitz, "Supremely secret: top court wants law clerks muzzled," *The Lawyers Weekly* (26 June 2009), online: <<http://www.lawyersweekly.ca>>.

51. Greene, *supra* note 32 at 212.

52. Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (Vancouver: UBC Press, 2012).

rather than the norm. It would be interesting to address systematically how easy (or difficult) it is for researchers to gain access to actors in the judicial system in Canada as compared to other countries.

IV. CONCLUSION

Our experiences have made us more acutely aware of the political dimensions surrounding JPE. We think that more research is needed to explain why JPE is or is not used in different jurisdictions, either alone or as part of a larger system of court evaluation. What role do macro-level factors (such as culture, institutions, and the transmission of ideas between jurisdictions) as well as more micro-level factors (such as leadership and group politics) play in whether JPE is adopted and, if adopted, in what form?

More research also needs to be conducted on the central question that motivated our foray into JPE in the first place—what are the linkages between judicial selection systems and the quality of judges appointed? Somewhat surprisingly, this question has attracted relatively little attention. For instance, while JPE has been viewed in the United States as a potentially important tool in bolstering merit-based appointment systems, it has not been used to determine systematically whether such systems lead to the selection of higher-quality judges compared to systems of direct appointment or direct election. Indeed, although research has been conducted on such questions as whether judges appointed in different systems decide cases differently,⁵³ scant research has been done on whether certain systems of appointment actually produce better judges.⁵⁴ Assessing the quality of judges appointed by the federal government under the screening committee system would provide a point of comparison for other selection systems, such as the nomination committee system used in Ontario, or even the systems of judicial elections found in the US states.

Our experiences have led us to think more carefully about conducting such research as academics. After two rounds adopting different approaches to evaluation, we have been stymied by the objections of legal organizations in Canada. However, we still believe the project is important. A systematic examination of the quality of judges appointed under the current process provides valuable information on the process itself. Debates over judicial appointments should be informed by empirical

53. Malia Reddick, "Merit Selection: A Review of the Social Scientific Literature" (2002) 106:4 *Dick L Rev* 729.

54. For exceptions see Damon M Cann, "Beyond Accountability and Independence: Judicial Selection and State Court Performance" (2007) 90:5 *Judicature* 226; Brody, *supra* note 21.

data rather than anecdotes spun out in the media. We hope that our research may spur discussion within official circles and the informed public about JPE.

Finally, we hope that, by highlighting our experiences, this commentary may lead to a dialogue within the legal community and between the legal establishment and academics about the potential value of scholarly study of the judiciary. We believe that carefully designed academic studies of the judiciary would give the general public, as well as legal and political elites, a better understanding of the judicial branch in Canada. Presently, perceptions of the judicial process in Canada may be unduly influenced by anecdotal media stories in the absence of more rigorous and systematic study.

APPENDIX: THE SURVEY INSTRUMENT

Evaluation

Please rank the judge on each of the following items for which you are familiar:

	Poor	Fair	Good	Very Good	Excellent	Not familiar enough to answer/ no answer
Knowledge of substantive law						
Ability to apply law to facts of the case						
Knowledge and application of the laws of evidence and procedure						
Written decisions and orders are clearly communicated						
Oral decisions and orders are clearly communicated						
Treats parties equally and with respect regardless of gender, ethnic origin, religion, age, disability, sexual orientation or socioeconomic status						
Demonstrates a basic sense of fairness and justice, including careful consideration of all the arguments presented						
Makes decisions without regard for the potential for public criticism						
Issues opinions and orders in a timely fashion						
Temperament and behaviour (attentiveness, treatment of court staff, acts with dignity)						
Effectiveness in formal settlement conferences						
Effectiveness in pre-trial (or pre-hearing) conferences (to clarify and narrow issues)						
Court management (punctual, prepared, docket management, control over proceedings)						
What is your overall evaluation of this judge?						
General Comments about the judge's strengths and weaknesses (optional)						

Decision-making

[Note: this section of the survey was removed prior to the second round]

As part of our research we are also interested in obtaining your impression of the judge's decision-making patterns, if any. Everything else being equal, how is this judge likely to decide?

Criminal Law	More prone to support the accused (motions, finding of guilt, sentencing recommendations and so on)	No discernible pattern	Less prone to support the accused (motions, finding of guilt, sentencing recommendations and so on)
Personal Injury	More prone to support plaintiffs (motions, decisions, assessment of damages)	No discernible pattern	Less sympathetic to plaintiffs (motions, decisions, assessment of damages)
Family Law	More prone to support the female	No discernible pattern	Less prone to support the female
Canadian Charter of Rights and Freedoms (legal rights—sections 7-14)	More prone to support the rights claimant	No discernible pattern	Less prone to support the rights claimant
Canadian Charter of Rights and Freedoms (fundamental freedoms, equality rights, language rights—sections 2, 15, and 16-23)	More prone to support the rights claimant	No discernible pattern	Less prone to support the rights claimant
General Comments about the judge's decision-making. (Optional).			