The Supreme Court of Canada 1892-1902: A Study of the Men and the Times

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Perhaps one area deficient in Canadian legal research is a study of the role value preferences and attitudes play in any judicial decision-making model.

Professor Weiler in his article, “Two Models of Judicial Decision-Making” outlined what the traditional Anglo-Canadian model of judicial decision-making entailed.

"... a judge decides his case by the somewhat mechanical application of legal rules which he finds ESTABLISHED in the legal system. They are, in this sense BINDING on him completely apart from his own judgment as to their fitness of his purpose."\(^1\)

Such a sterile view belies the complex intricacies involved in any human decision-making process. Although a judicial decision-maker is subject to certain constraining influences on his action, any attempt to explain his actions within the confines of a sterile mechanistic approach, completely lacks any perception of or any appreciation for the human complex.

The practically pernicious view of looking at the decision-making process is simply as an objective process of applying fact to law. However, Benjamin Cardozo has demonstrated what in essence such a view entails:

"... Their notion of duty is to match the color of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But of course, no system of living law can be evolved by such a process, and no judge of high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins."\(^2\)

Judicial creativity lies within this grey area. It is also within this area, that value preferences play their key role.

Behind the facade created by an outlook predicated upon a mechanical jurisprudence lies the realm of value judgements which constantly play a decisive role in the evolution of a final product. "It would be foolish to assert

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that when judges are engaged in solving problems all of their personal attitudes and values become dissipated in a bright glow of objectivity."3

A judge brings to every decision a myriad of experience derived from social life. To view the process from a highly mechanistic viewpoint ignores the fact that human beings are cognitive, selfconscious, creative, and act construing creatures. And, within this process, social purpose must be evaluated continually within a framework of ethical standards.

"It is for this reason that no amount of rationalized presentation of so-called logical argument can eliminate the need for choices to be made which may and often depend largely upon such valuations, whether conscious and deliberate or not."4

Oliver Wendell Holmes has described the process in the following manner:

"The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgement as to relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgement, it is true and yet the very root and nerve of the whole proceeding. You can give any conclusion a legal form."5

It is this statement, 'you can give any conclusion a legal form', that this paper attempts to explore and explain. It shall be demonstrated later that the methodology utilized by Professor Sidney Peck in his study of the Supreme Court of Canada, together with an appreciation of the actor as a complex phenomenon, reveals another model for exploring judicial decision-making.

It should be remembered, however, that judicial decision-making possesses certain characteristics which delineate it as a species of its own. The whole concept of judicial decision-making must be seen against the background of an institutional framework. In this way, certain constraining effects on the participant's role in the process can be seen. Yet, it is in actuality, by his perception of himself evaluated against this framework, that a judge distinguishes reality from fiction. Not only does the character of the participant play a dominant role in the process of decision-making, but the rules and manner of proceeding interact with the participant in the actualization of this process. What the researchers propose to do is to examine this interaction in order to describe the effect of judicial votes on policy issues. Although this will not explain why judges vote as they do, it is evidence which is relevant in such an investigation.

Samuel Krislov has written that the recent trend in the study of the Supreme Court of the U.S. has emphasized a de-humanizing depiction of the court. These studies would have us believe that pure thought and consideration of justice alone determine the outcome of a court controversy.6 One sees supposedly within these concepts the actual determination of litigious issues.

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5 Oliver W. Holmes Jr., "The Path of the Law", 10 Harv. L. Rev. 1897, 457 at 465.
However, such an approach tends itself to be a reification of abstract concepts. Justice is by no means an objective concept. Indeed

"Such a view ignores the simple and overwhelming fact that any judge's perception of justice is shaped by the social milieu in which he works and the manner in which presentation of an issue takes place... how one interprets justice is a human process involving all of the facets of human perception."7

To look at the court as guided by "neutral or impersonal principles" is to view the human phenomenon in a narrow, unidimensional way. Every justice brings to court his own personality, his own attitudes and his own manner of approaching problems.

An appreciation of the role attitudes and value judgements play among the justices of the Supreme Court will be utilized in this paper, as it attempts to present a picture of the Court in the years 1892-1902. An awareness of the complexities involved in any process of judicial decision-making, gives one more information with which to explore what in fact is going on in a court. By this paper the writers hope to create an awareness of how the judicial process in fact works.

The writers are in agreement with Llewellyn's "Law of Leeways" which states that

"... a judge generally feels bound by the statutes and the precedents... though to varying degrees, depending upon the individual. He is also impelled by the circumstances of the individual litigants and the social consequences created by the precedent involved in the case. Which of these does the judge follow. Where there is ambiguity in the previous law, he will more easily move in the direction of his personal inclinations according to the equities of the matter before him. On the other hand, if his desire to accomplish the result is overwhelming, he will find or even invent legal ambiguities to exploit. This means that the degree of legal ambiguity he needs to satisfy his desire to accommodate the individual litigant is a function of the force of his purpose."8

Professor Peck's model does not explain why judges vote as they do but merely illustrates the effect of their votes on certain issues. Similarly, Llewellyn's theory does not answer the former question but demonstrates simply how the results which a judge hopes to achieve can be rationalized within the framework of the law. Our approach, will not stress how the results of decisions are rationalized, but will attempt to explore possible motivations for such rationalizations. We will utilize Professor Peck's scalogram approach to determine the effect of judge's votes on issues and then use background material to suggest motivation.

That a study of voting patterns among the court can reveal little in terms of attitudes of the court members, is an often heard and mis-begotten criticism. It is basically founded on the notion that judgements are rendered in a mechanistic fashion. Most lawyers before the court however, are keenly sensitive to the ideological and personal line ups of the court.

"Before bringing a case to Court, they [lawyers] attempt to assess the possibilities of success and proceed only with those cases that they calculate will create a close decision within the Court or a decision in their favour... both sides make this calculation... On issues where extensive current litigation is taking place and where similar cases have been recently decided, the line-up can usually be rather

7 Ibid. p. 55.
8 Ibid. p. 76.
accurately predicted within a few votes and the swing men who are likely to determine the matter often identified. Gossip about current attitudes, past affiliations, political associations and ideological stands all supplement deduction from precedents. The lawyer's calculations are more often than not fairly accurate whether they utilize Llewellyn's semi-intuitive approach to what he calls "reckonability" or more systematic efforts...

In studying how the court actually works, one must also be aware of the recruitment of justices for the court. Such a study presents to the researcher information which can be evaluated in light of the members' effectiveness in the court.

"...the judge may be a person who has followed one political line for all his conscious life, or he may be one who has grown up in one political creed, but has switched to another late in life. The switcher may either retain traces of his old beliefs inconsistent with his present ones, or he may be a zealous convert, more religious than the original believers. The born liberal may be a little tired and unconvincing in practice, while the converted liberal may be a fireball..."10

The researchers do not claim that any one attitude or value is the 'predominant attitude or value' ultimately effecting any decision. It would be presumptuous on the part of these researchers to state conclusively that a single dominant attitude has been isolated. What is being suggested, however, is that a justice brings with him to any decision a whole myriad of attitudes and values, any one of which comes into play when other values are held in balance or weakly held.11

**HISTORICAL BACKGROUND**

**Controversial Period**12

The period chosen for this research paper is limited to the Court headed by Sir Samuel Henry Strong, Chief Justice from December 13, 1892 until November 15, 1902.

The Supreme Court of Canada had been established for only 17 years during which time it had failed, for reasons to be discussed, to develop as an independent institution respected by the public and the members of the Bar in Canada. How much this affected the decisions rendered will be seen from the research on the voting behaviour of the court.

The fact that the status of the court possessing the highest appellate jurisdiction in Canada was still being questioned politically, as well as publicly, perhaps was the principal reason for its stultified adolescence.

At the time the Bill for the establishment of a Supreme Court was being debated, certain amendments were put forth, most notably, amendment forty-
seven which called for the abolition of the right of appeal to the Privy Council. Amendment forty-seven was as follows:

"The judgement of the Supreme Court shall in all cases be final and conclusive and no error or appeal shall be brought from any judgement or order of the Supreme Court to any court of appeal established by the parliament of Great Britain and Ireland, to which appeals or petitions to Her Majesty may be graciously pleased to exercise her royal prerogative."\(^{13}\)

The proposal produced immediate havoc within Parliament. Sir John A. Macdonald, then leader of the opposition, declared that "this amendment was the first step toward the severence of the Dominion from the mother country."\(^{14}\) However, the amendment was adopted by the House by a vote of 112 to 40 only to be struck out at the third reading of the Bill before the Senate by a single vote cast by the Speaker to break a tie.

The result set in motion strong debate in the House carried on by the Prime Minister, Alexander Mackenzie and his Minister of Justice, Edward Blake. The question of the continuance of the right of appeal to the Privy Council struck at the heart of Canadian-British relations and the issue was carried by Blake to the Colonial Office in England.

The result left the Bill establishing the Supreme Court enacted as law but without any amendments to the right of appeal to the Privy Council. The ominous task of appointing membership to the court rested with Mackenzie who together with Blake, established the first court.

It is interesting to note that Mackenzie appointed the Honourable Telesphore Fournier who, as a member of his cabinet, had proposed the Bill for establishing the Supreme Court. Of further interest is the fact that amendment forty-seven which had caused so much rancour earlier had been invited by the Minister of Justice. In his introductory speech he stated that the declared purpose of the Bill was to reduce the number of appeals and to reduce the costs of litigation. "I would like very well to see a clause introduced declaring that the right of appeal to the Privy Council existed no longer."\(^{15}\) Perhaps in Mr. Fournier, Mackenzie had an avowed ally with respect to the whole question of appeals.

The question of the relationship of the Supreme Court to the Judicial Committee of the Privy Council would continue to plague Canadian constitutional history for 75 years. The result was to undermine the status of the Supreme Court within the Dominion especially in its formative years. Mr. Fournier's attempt to solve an inequitable situation in which litigants could break the back of other litigants by threatening to carry the action to the Privy Council was not favourably received.

In a speech Mr. Fournier made during the introduction of the Bill he stated that "he wished to see the practice [of appeals to the Privy Council] put an end to altogether", for the right of appeal had many disadvantages and "had

\(^{13}\) Frank MacKinnon, "The Establishment of the Supreme Court of Canada", 35 Canadian Historical Review 258 at 262.

\(^{14}\) Ibid. p. 258.

\(^{15}\) Ibid. p. 262.
been considerably abused in the Province of Quebec by wealthy men and wealthy corporations to force suitors to compromise in cases which they had succeeded in all the tribunals of the country.”

The statement should be kept in mind for later an attempt will be made to link Mr. Justice Fournier’s voting behaviour to this background.

"Thus from the beginning the "supremacy" of the Supreme Court was overshadowed by the right of appeal to the Privy Council in view of the inability of the Mackenzie government to secure its abolition. Although the right of appeal was to be limited it remained in the case of judgements of the court of last resort in the provinces. The losing parties in the provincial courts were to have the option of proceeding either to the Supreme Court or directly to the Privy Council. The Supreme Court was therefore "supreme" only in cases which were taken to it and even then its "supremacy" was subject to royal prerogative."

The status of the court was continually being challenged in the House.

"On April 21, 1879, a bill to abolish the Court was introduced by Mr. Joseph Keeler, a member for Northumberland East (Ontario) who branded it as "entirely unnecessary and useless." Both the Government and the Opposition treated the introduction of this bill as a practical joke and the first reading ended in a debate on procedure. But on February 19 of the following year, another bill with the same purpose was introduced and carried to second reading by Mr. Keeler. This time a lively debate took place on the merits and weaknesses of the Court. The critics decried the expense to the taxpayers of maintaining the Court; some declared that the cost to the litigants in appearing before it barred the poor from justice. Much objection was levelled at the decisions and the delay in rendering them. The possibility of the invasion of provincial rights was continually brought up. Political influence was also charged, for some branded the Court as a refuge for the political supports of the late administration. The Canada Law Journal thus summed up the criticisms, parliamentary and otherwise: "The Court has so far been a failure, partly owing to the inherent difficulties of our confederation, partly to the fact that the best talent has not always for some reason or other been taken advantage of, and partly owing to the difficulties and infirmities of a personal nature which we do not care to enlarge upon." Even a prominent member of the Government, Sir Hector Langevin, Minister of Public Works announced: "I myself have never had reason to entertain great love for the Supreme Court.""

The general weakness of the Court could be traced to the lack of respect characterized by ridicule, distrust, or in many cases, cold indifference. But the chief obstacle to its development as a viable institution and to its establishment of a distinctive jurisprudence of its own lay in the right of appeal to the Judicial Committee of the Privy Council.

"It was difficult to regard the Supreme Court as "Supreme" where there existed recourse to a higher tribunal, and for this reason many regarded the Court as being a needless step in the judicial process and held with Professor Dicey that the Privy Council was "the true Supreme Court of the Dominion.""

Perhaps this can account for the high rate of judicial votes against expanding the jurisdiction of the Supreme Court.

This is the background against which the court in the period of 1892-1902 can be seen. The court had not yet been able to rid itself of the controversy which surrounded it.

The Canada Law Journal in 1902 reported that discontent still prevailed among the public with respect to the existence of the Supreme Court.

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16 Ibid. p. 260.
18 Ibid. pp. 269-70.
19 Ibid. p. 270.
The Journal reported a letter published in a Montreal newspaper which stated broadly that the court is "generally and perhaps unavoidably the reward of public service and lacking through no fault of its occupants, the finality which would give weight to its decisions." The writer then concluded that nothing had been gained by the existence of such a court, because it did not enjoy the confidence which the Courts of Appeal of the various provinces did and because the settlement of questions of constitutional law affecting the relations between the Dominion and provinces, (which was one of the principal reasons for the existence of the court) as a rule went to the Privy Council for final adjudication. The Privy Council, in fact, overshadowed the Supreme Court.

Furthermore, behind the scenes the Court itself was engaged in much turmoil. As soon as the Court began functioning as a judicial body, personal conflict among the justices created such havoc as to undermine the development of respect for the institution itself.

"Justices Strong and Gwynne had no respect for the judgements of Justice Henry or for the leadership of Chief Justice Ritchie. In a letter to the Prime Minister, Strong described Henry's deliverances as "long windy, incoherent masses of verbiage, interspersed with ungrammatical expressions, slang and the veriest legal platitudes inappropriately applied," and advised that "nothing but his [Henry's] removal from it can save the unfortunate Court." He added that "I am not sure that the change if effected will make the Court efficient for the Chief seems to think of anything rather than his judicial work and is never ready with his judgements."21

In 1902, a daily newspaper in Ottawa, referred to as being the principal Government organ, printed an article under the headline, "Supreme Court Judges Squabble." The Canada Law Journal referring to the article stated that the word "squabble" was not too strong to describe the amount of internal dissension within the court.

"The spirit of discord and misrule which has been a characteristic of this court is somewhat remarkable where many of its members are models of courtesy and kindness. . . . The Court cannot be a success but must be a discredit to the country until some change is made which will supply or remove any discordant element and cause the business to be conducted with proper regard to the respect due to itself, as well as to the feeling and rights of those whose duty calls them to assist in its deliberations."22

Furthermore, the Canada Law Journal, voice of the legal profession, went on to state that the Courts of Appeal of the various provinces stand higher in the estimation of the Bar than does the Supreme Court of Canada. The Journal called for a reorganization of the Court with the very best legal talent being represented. It cast aspersions upon the present appointment of members who according to the Journal, were now appointed because they had political "pull", or because it was "desirable" to shelve them.23

By 1902, the legal profession in considering judicial appointments to the Supreme Court stated publicly in most poignant words that "to treat the Bench as a mere place of reward for political service and appointment of men whose only claims are those of political services, is little short of crime."24
The 'Strong' Court

Perhaps one of the most interesting aspects about Chief Justice Strong's Court is that as a judicial body it lacked both outside and inside a kind of reverence most people associate with a court of this stature. Owing to the political controversy surrounding its existence, the method of appointment, and personal conflicts among the members themselves, the court lacked a certain cohesiveness which would have brought to it the stability it needed. The method of appointment necessitated regional representation, but more than that, it provided reward to the politically active.

The analysis of the justices' voting patterns revealed a relatively high rate of dissent in the cases tested, (38%). This fact combined with an examination of the written reasons for judgment, lead the writers to conclude that the justices of this court could be characterized as rugged individualists who possessed no strong bonds among themselves. But this fact seems not to be peculiar to the Strong Court.

"It is a fair conclusion that no specific conventions have grown up in connection with the Supreme Court's operations. Its system is characterized by freedom from a system."25

BACKGROUND

Place of Birth

It was not until Sir Wilfred Laurier formed the Government, that all appointees to the Supreme Court were Canadian born. Of the ten justices who took part in Chief Justice Strong's Court, four including the Chief Justice himself were foreign born (i.e. British Isles). Strong, C. J., who was born in Poole, England, emigrated to Canada with his parents at age eleven. Gwynne, J., born in Dublin, Ireland came to Canada at age eighteen. Sedgewick, J., was from Aberdeen, Scotland and emigrated to Canada as a child. Patterson, J., was from London, England. He arrived in Canada at the age of twenty-two.

Prior Political and Judicial Experience

Four of the justices held key political positions in the government which appointed them. Mr. Justice Fournier was selected as Minister of Justice by Alexander Mackenzie in 1874. He later exchanged this portfolio for that of Postmaster General, a position which he held until his appointment to the Supreme Court of Canada in 1875. Mr. Justice Sedgewick occupied the post of Deputy Minister of Justice in 1888 in the Government of John A. Macdonald. He was appointed to the Supreme Court in 1893 by Prime Minister John S. D. Thompson, who in 1888 was himself the Minister of Justice. Mr. Justice Davies was Minister of Marine and Fisheries for Prime Minister Laurier from 1896 until his appointment as Puisne Judge in 1901. Mr. Justice Mills held the portfolio of Minister of Justice in the Laurier administration.

government as well, from 1897 until his appointment to the Bench in 1902. It is significant that the above Justices, as well as Mr. Justice Girouard, had had no judicial experience prior to their appointment to the Supreme Court of Canada. They moved directly from their position in Government to the Bench.

Two justices had been Prime Minister of their provinces. Mr. Justice King sat in the New Brunswick Legislature from 1867 to 1878 as a Conservative. He was the Attorney General from 1870 until he became Prime Minister in 1872, a position which he held until 1875. Mr. Justice Davies sat as a Liberal member of the Legislative Assembly of Prince Edward Island from 1872 until 1879. In 1876 he became Prime Minister for the province. Between 1882 and 1901 he sat as a Liberal in the Canadian House of Commons.

Mr. Justice Girouard represented the ridings of Jacques Cartier in the Canadian House of Commons between 1878 and 1895 for the Conservative Party. At that time he was appointed to the Supreme Court of Canada.

Only justices Strong, Gwynne and Patterson held no political office prior to their appointments to the Supreme Court of Canada; although Mr. Justice Gwynne had unsuccessfully run for a seat in the Parliament of the Union of Canada in 1848 for the Reform side of Politics under Robert Baldwin.

As mentioned previously five of the justices had no prior judicial experience: Justices Fournier, Sedgewick, Girouard, Davies and Mills. The Chief Justice had sat as a member of the Court of Chancery from 1869 to 1874, until his appointment to the Supreme Court of Ontario, where he remained until his elevation to the Supreme Court of Canada in 1875. Mr. Justice Taschereau sat on the Superior Court of Quebec from 1871 until 1878. Mr. Justice Gwynne was a member of the Court of Common Pleas in Ontario from 1865 until 1878, while Mr. Justice King sat on the Supreme Court of New Brunswick from 1880 until 1893. Mr. Justice Patterson sat on the Ontario Court of Appeal from 1874 until 1888. [However, during the period under investigation, he sat on the Supreme Court for only seven months and hence the data on him is too incomplete to establish voting patterns.]

SCALOGRAM ANALYSIS

Since our analysis of the “Strong Court” is based substantially on Guttman cumulative scales, the purpose of this section will be (1) to explain briefly the theory of cumulative scaling and its application to judicial decisions, (2) to explain the methodology of constructing such scales, (3) to explain their limitations in general and in the Canadian context, (4) to explain the significance that can be attached to such scales, and (5) finally to explain how we propose to utilize such scales in view of their limitations.
The Basic Theory and Methodology

The Guttman cumulative scale was a device employed by social scientists to determine the attitude of individuals toward certain social phenomena and secondly to compare the relative positions of the respondents by locating them on an attitudinal dimension or continuum.

Researchers elicited responses from the subjects by questions related to one social phenomenon. The questions were cumulative in the sense that each one posed a more extreme hypothesis than the previous ones. If a subject answered the most extreme question favourably, then presumably he would have answered the questions which were of a less extreme nature favourably all the earlier. Similarly, if for example the respondent answered the first and least extreme hypothesis negatively, then all the following more extreme questions would in theory be answered negatively. However, inconsistencies or responses which did not follow the expected pattern occasionally appeared because different attitudes might have been involved in the same question. Therefore, tests were devised to determine whether sufficient responses related to the attitudinal dimension under investigation.

In terms of judicial analysis, behaviourists theorized that judges decided cases based on their attitudes towards the issues raised rather than by an impartial application of the governing statutes, precedents and legal rules involved. In other words, a judge's structure of personal values led to judicial attitudes or predispositions towards deciding certain cases in particular ways.

The effect of a judge's vote upon an issue is indicated by classifying his votes as affirmative or negative. Consequently, a judge's vote and not his explicit reasons for judgement is considered his response to the issue raised by the case. For example, one could take all non-unanimous cases involving railways and classify the judges' responses in terms of whether or not the votes favoured the railway's position. If the measures usually taken to indicate unidimensionality were sufficiently high, one would conclude, (if one accepts the proposition that scalability evidences unidimensionality), that the cases were decided on the basis of the judges' attitudes toward railways, regardless of the issue or the opposition involved. Only non-unanimous cases are used since 'relative positions' can only be measured where there are

—G. A. Schubert, "Quantitative Analysis of Judicial Behaviour", The Free Press (1959);
—S. R. Peck, "ABehavioural Approach to the Judicial Process", (1967) 5 Osgoode Hall L.J. 1 at pp. 2-4;

27 See railway scale within.

28 For purposes of Scalogram Analysis of judicial behaviour viz., R. is .90 or greater and the difference between R and MMR is between .15 and .20 and S is .60 or better, the scale is said to be scalable and unidimensional in the sense that the responses are determined by a single dominant attitude. For an explanation of these calculations see the above references.
divisions which permit cumulative arrangement. However, as shall be pointed out later, we do not accept the view that the production of an acceptable scale establishes that judges reach their decisions on the basis of their attitudes. We will utilize the scalogram as a descriptive device to show the effect of judges' votes on certain issues. While such scales do not in themselves explain why judges vote as they do, they are useful in assisting researchers to arrive at such explanations. By combining 'acceptable scales' and relevant background material one may then conclude that value preferences do play a vital role in decision making.

Non-unanimous cases are arranged vertically in accordance with the proportion of affirmative votes contained. This is done on the assumption that cases containing fewer affirmative votes raise more extreme claims because fewer judges supported them. Such an arrangement is said to be cumulative. Cases are arranged chronologically in accordance with judgement dates; but this is departed from where inconsistencies can be removed by rearrangement. However, a case with a majority of affirmative votes is never placed within a group of cases having a majority of negative votes. Such a departure would virtually eliminate any possibility of a scale being truly cumulative.

The judges are arranged horizontally, the ones having the greatest number of affirmative or negative votes, appearing on the extreme left or right respectively. Ranking and description, however, is significant only in relation to the other judges on the scale and to the extremity of the claim before the court.

The relative position of judges can be assessed by scale scores. A score of 100 to 60 strongly favours the affirmative value, 59 to 20 is in favour of the affirmative value, 19 to -19 is neutral, -20 to -59 is in favour of the negative value, -60 to -100 is strongly in favour of the negative value.

If however, the scales are not considered cumulative, a second measure of a justice's voting pattern may be his voting division. On this basis a judge is considered to be strongly in favour of the affirmative value if he votes affirmatively in 80% to 100% of the cases in which he participates; in favour of the affirmative value 60% to 79%; neutral 41%-59%; in favour of the negative value, 21-40%; strongly in favour of the negative value 0-20%. If the voting divisions are used as Professor Peck suggests, then in cases of conflict with the scale score, the less extreme result should be used to classify

29 In Canada the judges' voting percentages in unanimous cases can be compared because the judges sit in panels. However, the deviations are not great and are not of much use for comparative purposes without the non-unanimous cases as well. This is for voting percentage analysis and not scalogram analysis.

30 For example 5-1, 4-1, 3-2, 2-3, and so on.

31 The point where a judge stops voting consistently affirmatively and begins to vote consistently negatively is considered his break point. Where there are non-participations this may be a "break zone". The judges' relative positions can be determined by assigning numerical values which reflect their break points. See Peck, "The Supreme Court of Canada 1958-1966", (1967) 45 Can. Bar Rev. 666 p. 678 (especially footnotes 30 and 31).

32 Ibid. p. 679.

33 Ibid. p. 680.
a judge's voting pattern unless there are special circumstances that warrant the more extreme scale classification. However, on the other hand, it may be argued that if the scales are not cumulative, voting division should be relied on always unless there are compelling reasons to adopt the scale score.

Limitations

In spite of the acceptability of scalogram analysis in most of the social sciences, such has not been universally the case in jurisprudential studies. In fact, there is much evidence which indicates that such scales are not cumulative and hence not unidimensional.

One criticism is that the behaviouralist approach "begs the question." Since the proposition that the scale indicates unidimensionality is based on the assumption that judges do decide cases based on attitude toward policy, behaviourists must assume the very thing they purport to demonstrate.

Another limitation is that there is no uniform body of rules for testing whether the scales are unidimensional. To test the degree of consistency, Guttman developed a formula for a "coefficient of reproductibility" (R), which indicated the percentage of consistency. A percentage of .90 was the minimum requirement. Menzel developed a coefficient of scalability (S) to complement Guttman's R. This was done because R tended to be artificially high if too many near unanimous cases were used. However 'S' itself tended to be spuriously high if too many sharply divided cases were used.

Another reason why an 'R' of 90 per cent might not be considered a good measure, is suggested by Schubert. Since judges usually have similar socio-economic backgrounds, their responses will always tend to be very consistent, and hence 90 may be too low a figure to reliably indicate unidimensionality.

There are many rules governing the ordering of cases and the assigning of inconsistent votes; but since these are not extremely rigid, different analysts can produce different voting patterns using the same data. This detracts from the argument that these are voting patterns objectively determined. Because of research discretion, apparently acceptable scales can be constructed by manipulation. Researchers shift cases to eliminate inconsistencies. The possibilities for shifting increase when the number of non-participations increases.

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34 In fact voting divisions may be more meaningful to the person who rejects scalogram analysis completely.
38 Menzel, A New Coefficient for Scalogram Analysis (1953), 17 Public Opinion Quarterly 268.
39 Tanenhaus, (1966), 79 Har. L. Rev. 1583 at 1593. This is a major problem with the scales that we have constructed. Most of the cases used fall within the range of 4-1 and 3-2 splits; therefore the R and S scores are not too reliable.
The question then posed is, "does a make-shift matrix really provide a sufficient basis for indicating that a panel of justices share a single well structured set of attitudes?" The cases may also not be cumulative because the splits may depend on the presence of other dimensions such as jurisdiction problems, federalism, precedent, etc.

Tenenhaus has constructed 'acceptable scales' by selecting various cases at random without a logical basis. Such a result seems to seriously weaken the argument that Guttman scales indicate unidimensionality. Schubert in rebuttal of this contention, specified that the researcher's hypothesis must be reasonable and non-trivial. However, it may be argued that even if the hypothesis is reasonable and non-trivial it may be acceptable by chance just as apparently Schubert indicates Tanenhaus' scale was.

Some argue that under Guttman theory, one would expect inconsistent votes to be concentrated around the respondent's break points, that is, where they consistently begin to vote negative. Apparently, this should be the zone of indecision. Since this has not generally been the case, it may indicate that the scales are not unidimensional.

It is also argued that even if the scales do exhibit unidimensionality, they do not really explain for what reasons a judge exhibits a particular attitude or for what policy reasons he may be voting as he does. This may be so, but in rebuttal it may be argued that such scales are merely a device to indicate attitudinal preferences, so that further research may give insight into motivational factors.

Behaviouralists are also criticized for not using unanimous cases in their research. Even those who admit scalogram analysis is useful for ranking judges on a comparative basis point out that unanimous cases are needed to locate the general posture of the court in relation to certain issues. For example, in non-unanimous criminal cases a court might vote in favour of a defendant 70% of the time, but in unanimous cases the percentage might be

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42 Tannenhaus 79 Har. L. Rev. 1583 at p. 1592.
43 Ibid. at p. 1591. See also - Peck (1967), 45 Can. Bar Rev. 666 at p. 675; Osgoode Hall L.J. 1 at p. 24. Professor Peck points out that in scalogram analysis, researchers classify a judge's vote in relation to a single issue isolated from a case possibly containing many issues. The classification of the judge's vote as favouring or rejecting the isolated issue may be a misdescription. It is more accurate to say that the scale only describes the effect of the judge's vote on the issue subtracted. For example a judge may not intend to vote against a criminal defendant but feels he lacks the jurisdiction to give the relief sought. The effect of the judge's vote is to deny the relief sought. The result may have occurred because the judge did not favour criminal defendants in general and used a jurisdictional argument as a means of denying the claim or he may have actually felt obliged to dispose of the case on purely a jurisdictional basis. Dual attitudes might be isolated by subscales. Professor Peck suggests a method of examining judicial behaviour in multi-issue cases. Ibid. p. 24-25.
44 Tanenhaus, 79 Harv. L. Rev. 1583 at p. 1593. See also Peck 5 Osgoode Hall L.J. 1 at p. 21 footnote 29.
45 Schubert, Quantative Analysis of Judicial Behaviour, pp. 280-281.
47 This may be explained by the use of subscales. See discussion at footnote p. 43.
43%. Therefore, it might be misleading to attempt to classify the entire court based only on the non-unanimous cases, unless what the researcher was trying to do and the limitations involved were explicitly set forth.48

Since only non-unanimous cases are used, researchers are usually working with only a small percentage of cases. If there are many non-participations in both non-unanimous and unanimous cases, then either set of cases alone might not be sufficient for comparative analysis of the justices. This may be especially important where voting division is relied on as a more accurate measure for ranking purposes than scale score.

Analysts who rely solely on votes often do not see the entire picture. It is true that a vote may often be the only indication of how a judge voted, but in other cases, a judge's explicit reasons may turn out to be his real reasons for the way he voted. The study of votes alone is also not as objective as many behaviouralists would have us believe.49 It often requires a subjective evaluation to determine how to scale a justice's vote.

Limitations in the Canadian Context

As has been pointed out previously, cases which are near unanimous artificially raise the R score; hence they should be excluded. However, in the Canadian context this would lead to the elimination of a substantial number of cases. Therefore, such cases must be included. The same problem is presented with sharply divided cases and the 'S' score.51 Therefore, the measures conventionally used to indicate consistency are often unreliable.

In the United States the justices of the Supreme Court sit as a full court. However, this is not the case in Canada and the result is numerous non-participations. Therefore, the ratio of positive to negative votes in any case may not be a function of the extremity of the claim, but of the attitude of the particular justice who happens to be on that particular panel.52 This could seriously weaken any argument that the scales are cumulative. Furthermore, if the scales are not cumulative, scale scores are not reliable for ranking purposes.53

Owing to the numerous non-participations in Canadian cases, break zones rather than break points will be more frequent and to this extent scale score will also be less meaningful.54

49 Peck, 5 Osgoode Hall L.J. 1 at p. 24.
50 See discussion under heading of 'limitations' relating to R and S scores.
51 The majority of the non-unanimous cases with which we are working are of the 4-1 and 3-2 variety. In the Modern Day period, the types of divisions are indicated by the scales constructed by Professor Peck (1967) 45 Can. Bar Rev. 666 at 685-687, 699-701, 716. For example on Professor Peck's taxation scale 61% are of the 4-1 variety and 36% are of the 3-2 variety (one is 3-4). This problem is pointed out at p. 684, footnote 48.
53 This is one reason for relying on voting division percentages.
Scale score and voting division will often not correspond in Canadian cases because of the non-participation element. On true Guttman scales, where there is full participation, the two measures will yield the same results. Consequently, in cases of conflict it becomes necessary to choose the measures which most accurately describe the voting patterns under examination. Professor Peck has suggested one criterion, but we suggest another. In view of the limitations of scalogram analysis, especially in the Canadian context, it is suggested that in cases of conflict voting division be used unless there are compelling reasons for using scale score. However in most cases this will yield the same result as Professor Peck's suggested method.

The numerous non-participations also facilitate the shifting of cases and raise the level of subjectivity involved in assigning inconsistent votes. As a result inconsistencies can be artificially eliminated and measures unduly maximized. In addition, because of this wide discretion, the number of different voting patterns that can be produced will be even greater in the Canadian context.

Unanimous cases are not considered in the United States because the justices sit as a full Court. If these cases were considered, the voting division of the judges would change proportionately, but their relative positions would remain constant. Such is not necessarily the case in Canada. Since the judges sit in panels the voting divisions of the judges on unanimous cases may be different from the voting divisions in divided cases. Consequently, it remains to be determined if the inclusion of unanimous cases along with non-unanimous cases would significantly affect the relative ranking of justices according to voting division.

That is to say, would the positions of the judges relative to each other remain the same although their voting percentages may have changed?

Relevance of Scalogram Analysis

If one is convinced that the Guttman technique does not produce acceptable cumulative scales in the judicial sphere, and especially so in the Canadian context, what use can be made of them?

Professor Peck has suggested various uses that might be made of scalogram analysis:

"... Scalogram analysis contributes to our understanding of the judicial process, as the scalogram is an informative, descriptive device. The scalogram focuses on voting behaviour in the large numbers of related non-unanimous decisions, highlighting the voting patterns of individual judges and of the court as a whole. It permits the construction of a composite picture of the judges' voting behaviour over a period of years as the membership of the court changes."

55 Ibid. p. 680, footnotes 35 and 36.
56 Unanimous cases do not appear on scalograms since they can not be arranged cumulatively. However, we have compiled the voting decisions for each justice based on both his unanimous and non-unanimous percentages.
58 While it is true that it highlights the voting pattern of the court as a whole in terms of non-unanimous cases, such a pattern can be misleading. Only by considering the unanimous cases as well, can the general posture of the court be determined.
Scalogram analysis therefore, will be used to show the 'effect' of the justices' votes on certain issues and claims by specific parties. Where judges consistently uphold or deny certain claims, the possibilities that value preferences play a significant role in decision-making are greater. In fact the scale might be considered prima facie evidence of such a hypothesis.\(^{59}\)

The likelihood that some judges decide cases on the basis of their attitude, might even be stronger in the cases of the justices who appear in the extreme ends of the scale.\(^{60}\)

It is not suggested that scalograms be used as the sole test for proving the possibility that judges decide cases on the basis of their attitudes.\(^{61}\) The possibilities suggested above must be assessed in the light of the issues involved, the explicit reasons given, the unanimous decisions and the background of justices.

**Proposed Use of Scalograms**

In our study we propose to use scalograms as descriptive devices in the manner suggested by Professor Peck. While we shall discuss the voting patterns of all the justices\(^{62}\) we shall concentrate on the justices appearing at the extremes of the scale. In the cases of these justices, it is submitted, that the evidence is more conclusive that value preferences play a significant role. After discussing all the scales, we shall try to classify generally the voting patterns of all the justices, and try to explain their voting pattern in the light of their backgrounds where possible.\(^{63}\)

**Use of Unanimous Scales**

We hope to demonstrate that because of non-participations, there are deviations between the judges on the unanimous cases as well. In general, however, it is submitted that these deviations are slight and not meaningful for comparative purposes when used without the non-unanimous cases.

Secondly, we shall try to determine whether the justices' overall voting percentages derived from both the unanimous and the non-unanimous cases, will result in relative ranking positions which very closely approximate that obtained by using the non-unanimous cases only.

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60 Peck, 45, Can. Bar Rev. 666 at p. 673; W. Mendelson (1963), 57 Am. Pol. Sci. Rev. 593 at p. 599. However, such a conclusion would seem to reject the idea that the scales were cumulative.

61 It is most probable that attitude is involved in all judicial decision functions. What must be determined is to what element in the case this attitude relates. For example, involved are the judge's views or attitudes in relation to the statutes, precedents, the substantial claims, the parties and the merits of the claims. Which of these elements is the dominant one is not easy to determine. While scalogram analysis might not give definite answers it may provide reliable evidence, which may help lead to more definite conclusions.

62 We do not discuss voting patterns of justices who appear only a few times on the scale, because the data is insufficient.

63 In this connection we shall concentrate on the polarized justices i.e. judges appearing on the extremes of the scale.
Thirdly, we shall show that any attempt to designate a court as liberal, conservative, etc. based only on non-unanimous cases can be misleading. For such purposes both the unanimous and the non-unanimous cases must be considered.

INTRODUCTION TO THE SCALES

Utilizing the methodology reported by Professor Peck in his research, our research reports the following scales: negligence, petition of right, railway, insurance and jurisdiction. It is important to remember that in our scalograms, we do not rank judges where they have participated in an insufficient number of reported cases (see scalograms).

Each scalogram contains relevant reported appeals decided by the Supreme Court between December 13, 1892 and November 15, 1902 while Strong was Chief Justice. On the scalograms and other scales, each justice is designated by letters. For example, Justice Fournier is designated by the letter F; Chief Justice Strong by the letter S; Justice King by the letters Kg and so on. Each case is designated by the volume and page number of its location in the Supreme Court reports. For example, 27-198 indicates the appeal reported at 27 S.C.R. 198.

During the period under investigation, the Supreme Court Reports contain 509 unanimous cases and 198 non-unanimous ones. Consequently, the ratio of unanimous cases was 62%, while that of the non-unanimous cases was 38%. The latter figure is quite substantial in comparison, for example to that in the period 1958 to 1967, studied by Professor Peck. Perhaps this is a good indication of the unsettled jurisdiction of the court as well as the dissension among the justices themselves.

Of the 198 non-unanimous cases, 82 or 41% appear on the scalograms.

NEGLIGENCE SCALE

The negligence scale reports the voting of the justices in thirty-two divided cases. The scale was designed to examine the possibilities of a correlation existing between the justices' votes in negligence disputes and the parties involved in the litigation. The appeals in the scale involve disputes between parties of unequal financial resources—i.e. individuals and companies (26 cases); individuals and government acting in a private capacity rather than in its traditional regulatory capacity (2 cases)\(^{64}\) and individuals going against other individuals (4 cases)\(^{65}\), where one individual has a greater economic advantage over the other (e.g. a dispute between an employer and an employee).

\(^{64}\) Cases 24-482; 31-206.
\(^{65}\) Cases 24-598; 22-53; 29-494; 29-548.
A vote favouring the party with an economic disadvantage is classified as affirmative, while a vote favouring the party with an economic advantage is classified as negative.

Negligence law is basically concerned with the redistribution of losses in society and the legal criterion for such a determination is generally conceded to be fault. However, value preferences may play a significant role in that a judge may try to affix the loss on the party better able to bear it. Hence, this scale is constructed in order to examine the effect of the justices' votes on the claims of the litigants involved.

**FINDINGS**

The R and S coefficients are .93 and .76 respectively, well above the minimum requirements. The reliability of these measures may be seriously called into question because over ¾ of the cases (69%) are near unanimous (i.e. 4-1, 5-1, 1-4, 1-5) while the remaining are sharply divided (i.e. 3-2, 2-3). Such a distribution raises the questions of whether the R and S coefficients may be artificially skewed higher.66

The difference between the observed consistency (R) and the least possible consistency (MMR computed for cases .74)67 given the structure of the scale is .19. Therefore the increase in consistency is considerable (where the minimum requirement is .15).

Therefore, if the cases are arranged cumulatively and if one accepts these measures as indicating unidimensionality, it could be concluded that the justices decided these cases on the basis of their attitude towards the parties involved rather than by a mechanical application of substantive negligence law to the facts.

As pointed out previously we reject the hypothesis, that scalograms indicate directly the justices' attitudes to the values involved. However, the scales may suggest the possibility that such is the case.68 One of the reasons we question the validity of scalograms is that the tests used to demonstrate unidimensionality (the R and S coefficients) are to a great extent arbitrary.

"Both tests are simply standards that have been adopted for convenience and have no particular justification either in mathematical or logical terms, or in any extensive survey of results to justify their usage. They are rules of thumb in their use but may or may not be appropriate."

66 See Tannenhaus, fn. 42.

67 MMR for judges is .72.

68 See Peck, op. cit. p. 681.

of thirty-two cases. (i.e. 18% of the cases reported for the period). This is one of the problems adverted to earlier — that is, because of the tendency of the justices to sit in panels, there are many non-participations. Since Fournier J. had been replaced early during Chief Justice Strong's period by Girouard J., (in September 25, 1895, less than three years after Strong C.J. had assumed the position of Chief Justice), the maximum number of participations possible in the thirty-two cases would be much lower. In fact, he could have participated in only twelve cases in all. His low participation is caused by both his early departure from the court and the court's practice of sitting in panels.

A further problem exists where scale score and voting division conflict. For example, with respect to Taschereau J., his scale score is —.19. This represents the neutral position with respect to his attitude toward the affirmative value, while his voting division, 63%, represents a position in favour of the affirmative value. Since it is probable that the scales are not cumulative owing to the limitations pointed out earlier in this paper, we emphasize voting division always over scale score utilizing the scale score to indicate tendencies, however. Therefore, with respect to Taschereau J., we would conclude that he is in favour of the affirmative value with a tendency toward the neutral position.

From the data on voting division and scale score we would depict the positions of the justices as follows.

Only Fournier J. (given the limitation mentioned earlier) is strongly in favour of the affirmative value. The effect of the votes of Justices Strong and King is to favour the affirmative value, while the effect of Justice Taschereau's votes is to favour the affirmative value with a tendency toward the neutral position. At the neutral position with no tendency in either direction are Justices Girouard and Sedgewick. The effect of Justice Gwynne's votes indicates that he is strongly in favour of the negative value.
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162 Votes
12 Inconsistent

Total
Voting Division %
Scale Score

R = .93
C of S = 76
MMRj = 72
MMRe = 74
R-MMRc = 19

+ = Vote for injured party
- = Vote for Tortfeasor
(i) company
(ii) government
(iii) employer
STUDY OF THE UNANIMOUS CASES:

*Analysis Using Voting Division*

One possible criticism of studying the unanimous cases in addition to divided cases is that their addition would tend to reaffirm what one has found in studying the divided cases alone. It is assumed that the relative positioning of the justices with respect to each other would be the same. Although this may be true for the American practice, it is not necessarily true for the Canadian Supreme Court which sits in panels. Thus a study of the unanimous cases could be quite revealing.

The ordering of the justices on the divided cases was the following: (Fournier J., Strong C.J., King J., Taschereau J., Girouard J., Sedgewick J., and Gwynne J.) with the percentage deviation between the highest and lowest being eighty-five percent. With the unanimous cases, on the other hand, the rank orders appears as (Taschereau J., Sedgewick J., Gwynne J., King J., and Strong C.J.) with the percentage deviation being nine percent: (Taschereau J. with 45% and Strong C.J. with 36%). Hence, the deviation in the unanimous cases does not appear to be too meaningful. However, to determine the value and accuracy of this finding “tests of significance” would have to be carried out.

From the divided cases it would appear that Strong J. was in favour of the affirmative value, whereas on the unanimous cases he was least in favour of that affirmative value. However a combination of the divided and unanimous cases reveals that Strong J. was more in favour of the affirmative value than all justices except Fournier J. This rank order for Strong J. was therefore correctly shown by the divided decisions alone.

When the divided and unanimous cases are combined, it reveals the same rank order as the divided cases, with only King J. and Taschereau J. changing positions. On the divided cases, King J. was eight percentage points ahead of Taschereau J. whereas when the unanimous and divided scales are combined, they are tied.

What in fact we have demonstrated is that the divided decisions have presented a rank order of justices which reflects the same positioning as the divided and unanimous cases combined. While this proposition has been assumed before, it has not been demonstrated by using Canadian cases.

GENERAL COURT POSTURE

The general posture of the court with respect to negligence actions is derived from combing the divided and unanimous cases and summating the positive and negative votes respectively.

By looking at the data from the divided cases alone, the court would appear to favour the affirmative value (i.e. the party with the economic disadvantage) 56% of the time. However, from the unanimous cases it appears to favour this same value only 42% of the time. The mean average of the
court (derived from combining both scales) as a whole demonstrates that the court favours the affirmative value only 47% of the time.

Since the unanimous cases represent the greater number of cases reported for the period, the conclusion would seem to be that the court as a whole favours the negative value (i.e. party with economic advantage), while on the contentious issues (i.e. divided cases) it favours the affirmative values slightly more.

This short discourse has been presented only to demonstrate that in attempting to present a picture of the court as a whole, all cases must be considered.

PETITION OF RIGHT SCALE

The scale reports the voting of judges on eleven cases and was constructed to examine the effect of the justices' votes on claims made by petitioners to recover compensation for injuries allegedly suffered at the hands of government (federal, provincial and municipal) acting in a quasi-private capacity.

The petitions included such disputes as breaches of contract, negligence and disputes over compensation awards. A vote favouring the petitioner was classified as affirmative whereas a vote favouring the government as negative. The petitioners in all but two cases are individuals.

FINDINGS

The R and S coefficients are .87 and .63 respectively. Since the R coefficient is below the minimum accepted level then even according to Guttman standards it cannot be said that the decisions were based on the justices' attitudes toward the parties involved. Perhaps the reason for the low R score lies in the construction of the scale. Different claims by petitioners were involved ranging from contract to negligence; the result being perhaps that different attitudes are being expressed based on the different substantive legal issues involved.

Another reason for the low R may result from the fact that the justices may be expressing different attitudes based on the level of government involved. As set out earlier, federal, provincial and municipal levels of government are included under the category 'government'. On the petition of right scale, a provincial government was involved in three out of eleven cases.69A If one were to look at the voting of Chief Justice Strong, one would find that in the eight cases in which he voted, three times he cast negative votes. The three negative votes were cast in the three cases where provincial government was involved. The same three cases account for the only inconsistent votes cast by Fournier J. and Sedgewick J. as well.

69A *viz.* 24-451; 24-1; 23-62.
Where the three cases are removed from the scale, the eight remaining cases represent only cases where the federal government is involved. The resulting sub-scale now has an R coefficient of .95, well above minimum acceptability.

From this it may be concluded that the effect of this justice's vote involving petitions of right is not to favour government generally, but more specifically to favour specific levels of government.70

**DESCRIPTION OF VOTING PATTERNS**

As pointed out earlier, we accept voting divisions as a more accurate description of voting patterns than scale score. At the extreme ends are Girouard J. and Strong C.J. who both are strongly in favour of the affirmative value while both King J. and Gwynne J. are strongly in favour of the negative value. At the neutral position are both Taschereau J. and Sedgewick J.

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70 The R & S coefficients are .95 and .78 respectively. As the difference between the observed consistency and the least possible consistency (computed for cases) given the structure of the scale is .22 the increase in consistency is considerable (MMR for judges was .68).
### PETITION OF RIGHT SCALE

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**Voting**

| 4 | 5 | 3 | 5 | 5 | 2 | 2 | 0 | 26 votes |

**Division**

| 1 | 3 | 1 | 5 | 5 | 6 | 7 | 1 | 29 votes |

**Scale**

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**Score**

| 100 | 82 | 73 | 27 | 09 | —64 | —64 | — |

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\textsuperscript{71} vix. 24-451; 24-1; 23-62.

\textsuperscript{72} Case 24-1 involves a railway and case 24-420 involves a city.
STUDY OF UNANIMOUS CASES:

*Analysis using Voting Division*

From the unanimous cases, it was seen that the percentage deviation between the highest and lowest judge is 29% with Sedgewick J. being the highest (56% neutral) and Taschereau J. the lowest (27% favouring the negative value). Therefore, this percentage deviation is great.

However, by combining the unanimous and divided cases the rank order remains basically the same as on the divided cases with Strong C.J. moving from first to third and Gwynne J. and King J. changing positions but with little difference in their voting percentage.

GENERAL POSTURE OF THE COURT

Considering the divided cases alone, the court favours the affirmative value (i.e. the petitioner) 47% of the time. In unanimous cases, taken alone, the court favours the affirmative value only 37% of the time. The mean average (combination of the divided and unanimous cases) reveals that the court generally favours government 58% of the time.

On divided cases the court appears to favour the petitioner more than on the unanimous cases. However, merely using the divided cases can be misleading. While the court does not favour the petitioner over the government to any great extent on either the unanimous or divided decisions, there is a definite trend. As the court moves from the unanimous cases to the more controversial cases (divided) it begins to favour the petitioner by an increase of 10%.

RAILWAY SCALE

The scale reports the voting of judges on twenty-three cases and was constructed to examine the possibility of a correlation existing between the justices' votes and all cases where railways are involved regardless of the other party or the substantive legal issues involved. In other words the effect of the justices' votes on the claims made in cases where one of the litigants is a railway will be examined.

A vote favouring the opposing party was classified as affirmative while a vote favouring the railways' positions was classified as negative.

A scale of railway cases was selected because historically this period represents the 'golden age' of railway building in Canada. Because of the great capital needed, we were interested in seeing whether the court would protect the development of railways by freeing them from excessive liability.
FINDINGS

The R and S coefficients were respectively .90 and .71. As the difference between observed consistency (R) and the least possible consistency (MMR) computed for cases (.72) was .18, the increase in consistency is considerable. Therefore, if the scale is truly cumulative and if these measures are accepted as establishing unidimensionality, one would conclude that the scale indicates that the justices reached their decisions on the basis of their attitudes to railways. However, we are not prepared to draw this conclusion. Nevertheless the scales are 'some evidence' that value preferences are involved in the process of decision-making.

Description of Voting Patterns

At the extreme ends of the scale are Fournier J. who strongly favours the affirmative value and Gwynne J. who favours the negative value. Strong C.J. demonstrates from his voting division a tendency to favour the affirmative value. Taschereau J., Girouard J., Sedgewick J. and King J., represent the neutral position although King J. demonstrates a tendency toward the negative value and Taschereau J. demonstrates a tendency towards the affirmative value. Chief Justice Strong's position represents one of the limitations in scalogram analysis owing to non-participations. From his scale score (—.22) one would conclude that he favours the negative value. However, by looking at his voting division (67%) he would appear to favour the affirmative value. The issue, however, was resolved as we stated earlier, in that we would accept voting division as representative of voting pattern and scale score to demonstrate tendencies where possible.

73 MMR for judges is .63.
### RAILWAY SCALE ALL CASES INVOLVING RAILWAYS REGARDLESS OF ISSUE OR OTHER PARTY

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| 7 | 11 | 7 | 9 | 9 | 8 | 5 | 1 | 1 | 0 | 58 votes |
| 1 | 9 | 5 | 11 | 6 | 7 | 15 | 1 | 0 | 2 | 57 votes |

Voting  
Division %  
Scale  
Score

| Voting | 8 | 20 | 12 | 20 | 15 | 15 | 20 | 2 | 1 | 2  
| Division % | 88 | 55 | 58 | 45 | 67 | 53 | 25 | - | - | -  
| Scale | Score | .83 | .57 | .13 | .04 | -.22 | -.22 | -.91 | - | - |

Note: — Vote for Railway  
+ Vote for Opposition  
R = 90  
C of S = 71  
MMRj = 63  
MMRe = 72  
R-MMRe = 18
STUDY OF UNANIMOUS CASES:

Analysis Using Voting Division

The percentage deviation ranges from Taschereau J. (56% neutral) to Girouard J. (47% neutral). Hence this deviation is not great enough for comparative purposes. The rank order of justices appears misleading, for Gwynne J. appears on the unanimous cases among the judges most favourable to the opposition, whereas a combination of divided and unanimous cases clearly demonstrates that he is the most unfavourable among the court toward the opposition, i.e. he clearly favours the railway. Therefore, the divided scale more accurately describes the relative positions of the justices.

On comparing the combined divided and unanimous cases with the divided cases alone, one finds that only two members of the court have changed position—Strong C.J. has moved from second to third, while Taschereau J. moves from third to second.

General Posture of the Court

With respect to the divided cases, the court favours railways 49.6% of the time (neutral posture). On unanimous cases, the court favours the railways 47% of the time (neutral position). On a combination of the scales, the court favours the railway 49% (again a neutral position).

Although the court would appear to take a neutral stance with respect to railways, this result could perhaps be explained. The conflicting attitudes of the 'polarized' justices would tend to neutralize each other, and since the other justices exhibit a neutral attitude in fact, this accounts for the classification of the court as a whole as neutral.

INSURANCE SCALE

Based on fourteen cases, the scale is constructed to examine the effect of the justices' votes on claims by insured individuals to recover indemnification from insurance companies.

A vote favouring the insured's claim is classified as affirmative while a vote denying this claim is classified as negative.

Findings

The R and S coefficients are .90 and .71 respectively. The difference between the observed consistency (R) and the least possible consistency (MMR) computed four cases (.74) is .16.\(^4\) Therefore, given the structure of the scale the increase in consistency is considerable. According to Guttman analysis the scale demonstrates unidimensionality.

\(^4\) MMR for judges is .62.
Description of Voting Pattern

At the extreme ends are Strong C.J. who is strongly in favour of the affirmative value (according to voting division) and Gwynne J. who is in favour of the negative value (according to voting division). The rest of the court rests in the neutral position — i.e. Sedgewick J., King J., Taschereau J. and Girouard J., although the latter two show tendencies in favour of the affirmative value. It should be noted that Chief Justice Strong’s voting pattern may be misleading as he did not vote in any of the cases on the bottom half of the scale.
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R = 90
C of S = 71
MMRj = 62
MMRe = 74
R-MMRj = 16

Note: + Vote for Insured
— Vote for Insurance Co.
STUDY OF UNANIMOUS CASES:

Analysis Using Voting Division

The range in unanimous cases is from Girouard J. 37% to King J. with 22%. Although the spread seems to be great, it is again misleading as Gwynne J. appears to rank third, whereas on a combination of the unanimous and non-unanimous scales he ranks last. Therefore, for comparative purposes, the unanimous cases alone would be misleading.

On a combination of unanimous and divided cases, the rank order is basically the same with only King J. and Sedgewick J. changing positions. On the divided cases King J. ranked fourth and Sedgewick J. fifth, the percentage difference between the two being only five. On the combination scale, their positions are reversed with the difference between the two being only 2%.

General Posture of the Court

On the divided cases taken alone, the court favours neither party (i.e. 51.4% for the insurance company). However, with respect to the unanimous cases the court favours the insurance companies 73% of the time. The mean average of the court computed for all cases reflects the court's favourable attitude towards insurance companies by a score of sixty-six percent. Therefore, it would seem that on the contentious issues, the court as a whole swings away from favouring the insurance company and takes a more neutral position with respect to the parties.

By looking at the divided cases alone, one would not see in which direction the court as a whole was moving. Only when the unanimous cases are examined as well can one have a gauge against which to judge the effect of controversial cases have on the members of the court. By utilizing this methodology it will be shown later which members of the court constitute the "swing" men in the court.

JURISDICTION SCALE

Given the historical fact that the jurisdiction of the Supreme Court as a final arbitrator was still a burning political issue, what effect, if any, had this on the voting of the justices? As pointed out earlier in this paper, the question of jurisdiction struck right at the existence of the Supreme Court. Given the political and public repercussions then, it is postulated that such issues must have had some effect on the question of the justices defining the limits of their own power.

The scale reports the voting of the justices on thirteen cases and was constructed to examine the effect of the justices' votes on claims seeking to uphold or restrict the jurisdiction of the Supreme Court. Although all the cases involve different claims or substantive legal issues, it is the question of the jurisdiction which is common to all cases.
A vote upholding the jurisdiction was classified as affirmative while a vote denying jurisdiction to a claimant was classified as negative.

**Findings**

The R and S coefficients are .92 and .67 respectively, while the difference between the observed consistency (R) and the least possible consistency (MMR computed for cases .74)\(^{75}\) is 18. Given the structure of the scale, then the increase in consistency is considerable. Therefore this appears to be an acceptable Guttman scale.

**Description of Voting Pattern**

Five fairly defined types of voting behaviour appear to have been clearly identified.

(1) Mr. Justice King's voting pattern may be classified as strongly pro-affirmative value — i.e. strongly in favour of extending the jurisdiction of the Court; this conclusion has been derived from the fact that his voting division .80 and his scale score of .85 indicate that the effect of his votes on the five cases in which he participated was to support a claim for extending the jurisdiction. Although he participated in only five of the thirteen cases reported for this period, the maximum number of cases in which he could have participated was seven.

(2) The voting pattern of Mr. Justice Gwynne based on ten cases in which he participated may be classified as pro-affirmative on the basis of his voting division of .60 and his scale score of .54.

(3) Mr. Justice Girouard may be classified as neutral with respect in that his voting division was .40 and his scale score was .00.

(4) Both Mr. Justices Taschereau and Sedgewick would be classified as in favour of the negative value, that is, denying any attempts to extend the jurisdiction of the court.

(5) Mr. Justice Fournier has been classified as in favour of the negative value, based on a voting division of .33 with a tendency to be strongly in favour of the negative value based on his scale score of -.62. This tendency to be strongly in favour of the negative value would tend to be slight considering that a scale score of -.60 to -1.00 indicates the strong tendency.

(6) Only Mr. Justice Strong would appear from his voting division of .17 and a scale score of -.69 to be strongly in favour of the negative value.

\(^{75}\) MMR for judges is .70.
### JURISDICTION SCALE

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Voting Division %

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Note: + vote upholds Juris
       − vote denies Juris
STUDY OF UNANIMOUS CASES:

Analysis Using Voting Division

A study of the unanimous cases would demonstrate that the rank order of the justices at the extreme ends, that is, with King J. and Strong C.J. is the same as with the divided cases. Only with respect to Sedgewick J., Gwynne J., Girouard J. and Taschereau J. have their positions changed; but it is arguable that the position differentiation being only .03 percentage points in the unanimous cases, that this is not a meaningful deviation.

With respect to the combination of the divided and unanimous cases, it can be seen that the first, second, sixth and seventh rank positions are occupied by the same justices as on the divided scale taken alone — viz. King J., Gwynne J., Taschereau J. and Strong C.J.

The change in rank order has occurred among Girouard J., Sedgewick J., and Fournier J., but their percentage deviations are so insignificant (.03%) that for the purposes of rankings they remain relatively constant in both cases. For example, on the divided cases their positioning and percentage was the following; Girouard J., Sedgewick J. and Fournier J.: 40; 36; 33. On the combination of divided and unanimous cases the positioning and percentage deviation was: Fournier J., Sedgewick J. and Girouard J.: 36, 33; 33.

General Posture of the Court

From the divided cases taken alone, it would appear that the court is neutral with respect to voting division (42%). On the unanimous cases, however, the court appears to be in favour of the negative value, that is, it denies jurisdiction, 31 per cent of the time. The mean average for the court in all cases again demonstrates a position favouring the negative value (33 per cent).

From this one could conclude that on the divided cases, the court moves in a direction away from denying jurisdiction, although only slightly. For although the court denies jurisdiction 41 per cent of the time; 40 per cent is the minimum requirement for this neutral area.

SUMMARY AND CONCLUSIONS

The voting patterns described on each scalogram for each Justice is represented in this diagram by indicating the position of each justice on a "profile line", divided into five separate segments to represent the five categories of highly pro-affirmative, pro-affirmative, neutral, pro-negative and highly pro-negative. The ranking of the justices on this profile line is based on their voting division, with scale score only indicating a tendency towards movement in the one direction or the other, where applicable.

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DIVIDED DECISIONS

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Note: Fournier is omitted from the insurance box because of too few participations.

An examination of the scalograms taken together indicates that some justices tend to have one sided voting patterns on more than one scale. It should be noted that the positioning of the justices on the jurisdiction scale demonstrates a reversal of form. For example, Justice Gwynne appears on the left of the scale instead of the right as he does on the other scales. Similarly, Justices Fournier and Strong appear on the right of the scale whereas on the other scales they appear on the left. However, the construction of the jurisdictions scale by the researchers could have been reversed except that the researchers wished to designate a vote denying jurisdiction as negative. The researchers could have just as easily reversed designations for the jurisdiction scale producing a pattern on the profile line not unlike the positioning of the other four scales. That being the case, it can be concluded that the justices demonstrated for all scales similar one sided voting patterns. It is significant that once the voting pattern of each justice has been demonstrated on the profile line not one of the justices crosses the neutral zone: For example, Justices Fournier and Strong always stand on the affirmative side of the line. (The exception being, of course, the jurisdiction profile but only because of construction) whereas Justice Gwynne always stands on the negative side (again the exception of course, being the jurisdiction profile). Furthermore, a justice who varied from the neutral position always varied in the same direction, viz., Justices Girouard, Taschereau, King and Sedgewick.

In reality the jurisdiction scale raises value preferences unlike the prior four scales. In those latter scales 'big interests' are set against 'smaller interests'. Hence, in these scales the effect of the votes of the justices appearing on the right is to favour the former value, while those of the justices on the left is to favour the latter value.
This diagram is of use in identifying what the researchers term the “swing men” in the court, that is, justices whose one-sided voting patterns may determine the actual outcome of any litigious issue. The voting patterns of Justices Strong, Gwynne, and Fournier have never placed them in the neutral position, indicating that their votes identified them as occupying key positions. Furthermore, their voting behaviour further suggests that value preferences may play a more significant role in their decision-making than in that of the other justices.

Professor Peck has suggested that as the appeals on each scale raise a wide variety of legal issues, it is reasonable to hypothesize that a justice who appears near the left or right side of the scales and has voting patterns classified as “highly pro” or “pro” bases his decisions at least in part on the value or policy issue raised by the appeals on each side.

VOTING PATTERNS AND JUDICIAL BACKGROUND

As set out earlier in this paper, the researchers were interested in attempting to link actual voting behaviour with the background of the justices. It should be noted that in no way does our research into voting behaviour and background evince a cause and effect relationship. Such an attempt would not only be presumptious but also hide within it fallacious assumptions. To perpetuate assumptions based on a cause and effect proposition belies the complexity of human behaviour and opts for a conceptualization which sees rigidity rather than fluidity in human behaviour. Like the old adage that warns one not to judge a book by its cover, similarly with human behaviour, it cannot be explained by looking solely at its outward manifestations.

With these reservations in mind, what we propose to do, is to look to some of the “social” characteristics of those justices whose voting has located them either to the left or right of the neutral position on the profile line. This will be done in order to see whether their background may help provide us with a picture of a justice involved in “human” decision-making.

Justice Telesphore Fournier

Given the construction of the scales it may be concluded that his voting pattern demonstrates a strong tendency to vote for the individual in all appeals on divided decisions where an individual litigant could be identified. For example, in the negligence scale he voted strongly in favour of the individual with an economic disadvantage who usually was going against a company, government or employer. On the petition of right scale he tended to favour the petitioner (generally an individual) against the government. Furthermore, his voting on the railway scale demonstrated a tendency to strongly favour the individual going against the railway especially since the majority of cases involved a party with an economic disadvantage.

Given this voting pattern, the researchers looked to his background to see whether it may help to explain this one-sided voting bias.
During the early part of the 1850's Justice Fournier had been a member of the Parti Rouge, a French reform movement of Canada East and politically a reformist Liberal party. During the later part of the same decade, he assumed the editorship of a French Canadian liberal newspaper, 'Le Nationale'. In this role he continued to back reform movements. His background demonstrated that he was not from a wealthy family, his father being a miller and his education not extending beyond a Jesuit College.

His liberal politics and reform minded policy did not however go unnoticed, for after having attained a seat in Parliament in 1870 representing the Liberal Party for Bellechasse, he was given a cabinet appointment as Minister of Inland Revenue by Prime Minister Mackenzie in 1873. In 1874, he was appointed Minister of Justice during which time he brought forth the Supreme Court Act. However, the attempt by the Liberal government to seek the abolition of appeals to the Privy Council failed. One of the reasons for seeking the latter reform was abuse by the wealthy in unduly extending appeals.

During the early part of the 1870's the federal Liberal Party began to take on a definite shape and form, presenting an alternative to Macdonald's Conservative Party. The federal Liberal Party of the time

"... steadily opposed the sweeping and expensive schemes of Conservative Ministers... they attacked the dangerous influence of railways and business in the government and stood for farming interests... In particular the Liberals came to stand for provincial rights whereas Macdonald repeatedly stressed the superior power of the central government. Accordingly, Liberalism gathered support in most of the provinces from those who felt that the Dominion was riding rough-shod over the just rights of the different sections that had entered confederation."

Such was the political background of Justice Fournier, a man weaned on radical liberalism in the 50's, aligning himself against privilege and wealth. Since his appointment to the Supreme Court followed his political career and since he possessed no prior judicial experience, then possibly he was not encumbered by the mechanical application of precedent but rather approached his task more from a position of policy.

However, one aspect stands out in his voting behaviour. On the jurisdiction scale his voting pattern exhibited a tendency towards denying rather than extending the jurisdiction of the Supreme Court. This anomaly may perhaps be explained by the fact that he believed that a Supreme Court ought to play a more circumscribed role, dealing solely with constitutional disputes. On the other hand, perhaps his voting may have demonstrated that he was a provincialist at heart, seeing the provincial courts as supreme within their own sphere.

Such are some of the characteristics of Justice Fournier. A radical reformer in the '50's, editor of a radical Liberal newspaper which took up the cause for French-Canadian nationalism, a moving force behind the establishment of the Supreme Court of Canada and a member of a Federal Liberal Party which sought to protect the rights of the individual against what was then feared the growing strength of corporations.

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77 J.M.S. Careless: Canada; A Story of Challenge (Toronto: Macmillan Co. of Canada, Ltd. 1963) p. 268.
Justice Samuel Henry Strong

Justice Strong, as Justice Fournier, tended to favour the individual in cases heard before him. On the negligence and railway scale he tended to favour the party with the economic disadvantage. On the petition of right scale he tended to favour the petitioner rather than the government, except, however, where the provincial government was involved. This incongruity could perhaps be explained by the fact that although he never involved himself in politics, he was appointed to the Supreme Court by Mackenzie's Liberal Government. Having been appointed to the Supreme Court of Ontario during the time when Oliver Mowat a staunch provincial rightest headed the provincial government, may suggest that as Justice Fournier, he too was a provincial rightest. Perhaps this is further borne out by the fact that on the jurisdiction scale he voted against extending the jurisdiction of the Supreme Court suggesting that he too believed that the Supreme Court played a more circumscribed role.

Since both Justices Strong and Fournier were original appointees to the Supreme Court by Mackenzie, their appointments perhaps ensured that the bench would possess two men who sought to consolidate provincial rights. Justice Strong was Mowat's man while Justice Fournier was Mackenzie's. In 1897 Justice Strong was sworn of the Imperial Privy Council, and became a member of the Judicial Committee of the Privy Council, an institution strongly known as an upholder of Provincial rights.

If that perhaps presents some indication as to where his political preferences lay, then it is not difficult to extend it to explain why he tended to favour the individual litigant. Furthermore, during his earlier legal career, he had been an equity lawyer and later sat for five years on the Court of Chancery.

It was written in a biography about Chief Justice Strong at the time that, "...there is no keener intellect on the Canadian Bench and great deference is paid to his judgements, not only by the profession at large, but by his brethren in the Bench of the Supreme Court. He is especially distinguished for his knowledge of Law as a science and of the principles of jurisprudence generally. ..."  

Justice John Wellington Gwynne

From his voting behaviour it can be concluded, based on his consistent voting for railways and insurance companies, that Justice Gwynne favoured business interests. Furthermore, he voted against the individual on the negligence scale and for government in the petition of right scale, leading one to conclude that Justice Gwynne favoured government as well as big business.

Justice Gwynne was appointed to the Supreme Court of Canada by Sir John A. Macdonald who exhibited a type of conservatism which devoted itself to building up the Dominion and preserving the federal nature of the Union. Furthermore, Macdonald's Government tied itself closely with wealthy business and railway interests.  

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78 Canadian Pictorial History: Queens Printer 1901 (on reserve Canadian Archives, Ottawa).
79 J.M.S. Careless op. cit. pp. 264-5.
On the jurisdiction scale, Justice Gwynne consistently voted for extending the jurisdiction of the Supreme Court. He saw that the Supreme Court would play a viable part in maintaining a federated union with a strong centralist government. His position with respect to the constitution demonstrated clearly a centralist bias. In *City of Fredericton v. The Queen*, Justice Gwynne described the nature of Canadian federalism by describing the B.N.A. Act as creating a Dominion "absolute, sovereign and plenary . . . in all matters whatsoever, save only in respect of matters of a purely municipal, local or private character . . . of certain subordinate divisions termed Provinces carved out of the Dominion." He saw the Dominion as giving life to and creating the very existence of the provinces.

From his voting on the jurisdiction and petition of right scales, one can detect this bias in his voting for a strong centralized government and for a Supreme Court whose powers were as supreme with relation to provincial courts as the Dominion's powers were supreme to provincial government. Gwynne's "Conservatism" extends back into the 1850's when he became an adherent of Robert Baldwin, a reformer, but no radical, who sought full British constitutional practice, but at the same time wanted to preserve the imperial bond. A reformer was one who sought the development of responsible government in Canada at the time. He sought popular control over elected representatives and over the office of Lieutenant-Governor. On the other hand, while a radical sought a different mode within which it could be expressed. That mode, was somewhat akin to the American Republican system of government.

Although Justice Gwynne sought political office he failed in his only attempt to enter Parliament and pursued it no further. However, his political leanings did not go unnoticed, for as soon as Macdonald wrestled control of the Government from the Liberals in the election of 1878, he appointed Gwynne when the first vacancy in the Bench occurred.

In the business world Justice Gwynne achieved great success. Although unsuccessful in his attempt to enter the Parliament of the Union of Canada in 1848, he devoted himself to other schemes of which a biography of Gwynne stated that it was not "improbable that his wish to enter Parliament was largely due to a desire for their furtherance". These "other schemes" were primarily railways.

In the early years of the railway era in Canada he had formed a company for construction as part of a scheme of colonization of a line of railways from Toronto westward to Huron. In 1847 he had obtained an act of incorporation for this company which subsequently developed into the Toronto and Guelph Railway Company and finally in 1853, became amalgamated with the Grand Trunk Line (which was later to become part of the C.N.R.). His biography further goes on to state that:

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80 (1880) 3 S.C.R. 505.
81 J.M.S. Careless op. cit. p. 190.
82 Canadian Pictorial History *supra* footnote 78.
"... he also interested himself in the advancement of other railway projects and spent much time and money in maturing schemes from which the great railway companies of Canada have derived more profit."\(^{63}\)

Gwynne's association with railways did not stop there, for during the 1860's he lived in Hamilton, Ontario as solicitor for the Great Western Railway Company. Furthermore, through the marriage of one of his daughters his family became "tied" to railways even more intimately. His daughter married Collingwood Schriber, Deputy Minister and Chief Engineer of Railways and Canals.\(^{64}\)

In Gwynne, Macdonald saw a natural ally for his desires of building a Dominion. The support of wealthy business and railway interests was essential to fulfil Macdonald's schemes. The railways were to play a key role in uniting the Dominion from sea to sea.

The remaining four justices present a voting pattern which identifies them mainly in the neutral position in the profile line with only occasional deviances.

**Justice George Edwin King**

Although on the negligence scale he tended to favour the individual, in the petition of right scale he tended to favour government. This anomalous situation can perhaps be explained given certain facts from his background. Between 1872-78 King, as Leader of the Conservative Party was the Prime Minister of New Brunswick. During this time he was responsible for the abolition of imprisonment for debt; and as well, his government passed the free schools act.

Appointed to the Supreme Court by the Federal Conservative Party his voting in favour of extending the jurisdiction of the Supreme Court could reflect a centralist bias, which perhaps also explains his voting on the petition of right scale. Yet on the other hand, this explanation would appear to be inconsistent with his being a provincial Prime Minister previously. It's apparent therefore, that a more satisfactory explanation is needed.

On both the railway and insurance scales, however, his voting patterns locate him in the neutral position which cannot be explained.

Perhaps Justice King represented one of the first truly Canadian Justices. As were Justices Fournier, Taschereau and Girouard, he was Canadian born, but he was the first native born English Canadian appointed to the Bench.

**Justice Henri Elzear Taschereau**

The only time his voting pattern places him outside the neutral zone is in the negligence and jurisdiction scales. With respect to the former, although outside the neutral sphere, his scale score would indicate a tendency towards the neutral zone. With respect to the latter scale, his votes denying the extension of the jurisdiction of the Supreme Court could evince a provincialistic bias.

\(^{63}\) Ibid.

\(^{64}\) Canada Law Journal Vol. 38, 1902 p. 60.
Justice Robert Sedgewick

His voting is neutral on all scales except the jurisdiction scale where he is classified as denying the extension of the jurisdiction of the Supreme Court. Although Deputy Minister of Justice under John A. Macdonald and later appointed to the Supreme Court by John S. D. Thompson’s Conservative Government, our research has uncovered nothing which would explain this contradictory voting pattern.

Justice Desire Girouard

His voting places him in the neutral zone on all scales, except the petition of right scale, on which he voted in favour of the individual. Again he too like Sedgewick J., sat in the House of Commons for the Conservative Party and was appointed to the Bench by the then Conservative Prime Minister, Mackenzie Bowell, but our research revealed a distinct lack of material respecting his background.
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<th>Neutral</th>
<th>Con</th>
<th>Highly Con</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Negligence</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td>(i) 42%</td>
<td>(50 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>party at economic disadvantage</td>
<td></td>
<td>(ii) 56%</td>
<td>(32 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td>(iii) 47%</td>
<td>(82 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>petitioner</td>
<td></td>
<td></td>
<td>combined</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2. Petition of Right</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(i) 37%</td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(13 cases)</td>
</tr>
<tr>
<td>petitioner</td>
<td></td>
<td>(i) 47%</td>
<td>(11 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td>(ii) 47%</td>
<td>(24 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>party opposing railway</td>
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<td></td>
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<td></td>
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</tr>
<tr>
<td>3. Railway</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(i) 53%</td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(29 cases)</td>
</tr>
<tr>
<td>party</td>
<td></td>
<td>(i) 50%</td>
<td>(23 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>opposing railway</td>
<td></td>
<td>(ii) 50%</td>
<td>(23 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td>(iii) 51%</td>
<td>(52 cases)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>insured</td>
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<td>4. Insurance</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(i) 27%</td>
</tr>
<tr>
<td>How often court favours</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(31 cases)</td>
</tr>
<tr>
<td>insured</td>
<td></td>
<td>(i) 50%</td>
<td>(14 cases)</td>
<td></td>
<td>(45 cases)</td>
</tr>
<tr>
<td>insured</td>
<td></td>
<td>(ii) 50%</td>
<td>(14 cases)</td>
<td></td>
<td>(45 cases)</td>
</tr>
<tr>
<td>5. Jurisdiction</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(i) 31%</td>
</tr>
<tr>
<td>How often court upholds</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>(55 cases)</td>
</tr>
<tr>
<td>Juris.</td>
<td></td>
<td>(ii) 42%</td>
<td>(13 cases)</td>
<td></td>
<td>(66 cases)</td>
</tr>
<tr>
<td>How often court upholds</td>
<td></td>
<td>(iii) 33%</td>
<td>(13 cases)</td>
<td></td>
<td>(66 cases)</td>
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</tbody>
</table>
This diagram represents a picture of the general position of the court respecting cases in the above categories of the Supreme Court of Canada reported between December 13, 1892 and November 15, 1902. The cases have been broken down into unanimous and divided decisions with the number of cases of each type presented in brackets and with the position of the whole court represented in a percentage figure. This figure was calculated by summing the number of positive votes over the total number of votes cast on each scale. After calculating the percentage of positive votes over the total number of votes for each scale, the researchers then performed the same calculation for all cases, both divided and unanimous.

Since unanimous cases are far more numerous than divided ones on all but the petition of right scale, they have a significant effect upon the final determination of the court's general posture.

It would appear from the diagram that the court on all divided cases took a neutral stance with respect to the values being expressed. This perhaps reflects the fact as outlined earlier in this paper that the court had failed during its early years to develop a distinctive jurisprudence of its own. Given the controversies surrounding its very existence, it is not unlikely that the justices were quite aware of this and that such an awareness perhaps artificially constricted its development as a viable institution.