

THE SUPREME COURT OF CANADA, 1958-1966: A SEARCH FOR POLICY THROUGH SCALOGRAM ANALYSIS

S. R. PECK*

Toronto

Introduction

It is safe to predict in Centennial Year that before the Supreme Court of Canada celebrates its one hundredth birthday on April 8th, 1975,¹ its work will be made the object of behavioural studies which will add a new dimension to the lawyer's understanding of the court's role in the nation's political life. Behavioural investigations of the judicial process in the United States of America, inspired by the work of those judges, law teachers and lawyers known as Legal Realists but carried out by political scientists rather than lawyers, have been published in large numbers in the past fifteen years.² Focusing largely on the work of the Supreme Court of the United States, and emphasizing aspects of that work not traditionally considered by lawyers, these studies mark judicial behaviouralism as one of the most provocative developments in American jurisprudence since the second world war. In Canada, interest in behavioural approaches is growing among political scientists and law teachers,³ and a number of behavioural and statistical studies of the Supreme Court of Canada will soon be published.⁴

*S. R. Peck, of Osgoode Hall Law School, Toronto.

¹ The Supreme Court Act, 38 Vict., c. 11, received the Royal Assent on April 8th, 1875, and the six original members of the court were appointed on October 8th, 1875.

² For references, see G. A. Schubert, *Bibliographical Essay: Behavioral Research in Public Law* (1963), 57 Am. Pol. Sci. Rev. 433; S. R. Peck, *A Behavioural Approach to the Judicial Process: Scalogram Analysis* (1967), 5 Osgoode Hall L. J. 1, at pp. 2-4.

³ P. Meyer, *Jurimetrics: The Scientific Method in Legal Research* (1966), 44 Can. Bar Rev. 1.

⁴ S. R. Mitchell, *The Supreme Court of Canada Since the Abolition of Appeals to the Judicial Committee of the Privy Council, A Quantitative Analysis* (June, 1967), paper presented at the annual meeting of the Canadian Political Science Association, Ottawa (mimeograph); an enlarged version is to be published. Professor Peter H. Russell has applied statistical

The judicial behaviouralists in the United States have developed several different approaches to the study of the judicial process; however, they share certain characteristics which identify them as a school of thought. They all look upon the administration of public law by courts as an aspect of political behaviour, in continuous interaction with other political institutions and forces; and, accordingly, they regard judges as policy makers. They bring to the study of courts, the theories and techniques of the social sciences, particularly political theory, economics and social psychology, and focus upon the behaviour of individual judges and other participants in the judicial process. They use statistical methods of data processing, and so are able to consider larger samples of the relevant data than was possible for earlier students of the judicial process.

Judicial behaviouralism, as might be expected, has not come upon the jurisprudential scene as a fully developed and perfected discipline. The validity of the theories on which behavioural studies of the Supreme Court of the United States are based, and of the methods used in those studies, has been challenged, and is the subject matter of an ongoing debate.⁶ A behavioural analysis of the work of the Supreme Court of Canada must bear the burden not only of the theoretical and methodological problems already identified in the United States, but also of new and different problems arising from the application of behavioural techniques to a court with distinctive characteristics. Accordingly, the present attempt to apply a behavioural method of analysis to the Supreme Court of Canada, is as much a test of the method, as it is an investigation of the work of the court. It is offered as a report of an initial effort in a new direction, and not as a statement of a final position.

In the present article, I investigate the work of the Supreme Court of Canada in three areas—taxation, negligence and criminal law—through the use of scalogram analysis. I first discuss the method, and then apply it to the three areas mentioned.

methods of analysis to certain aspects of the work of the Supreme Court of Canada in a study done for the Royal Commission on Bilingualism and Biculturalism. This study will be published in the near future. I understand that Professor J. L. Baudouin has done work using statistical methods for the Government of the Province of Quebec.

⁶ W. Mendelson, *The Neo-Behavioral Approach to the Judicial Process: A Critique* (1963), 57 *Am. Pol. Sci. Rev.* 593; T. L. Becker, *Political Behavioralism and Modern Jurisprudence* (1964); J. Tanenhaus, *The Cumulative Scaling of Judicial Decisions* (1966), 79 *Harv. L. Rev.* 1583; H. J. Spaeth, *Unidimensionality and Item Invariance in Judicial Scaling* (1965), 10 *Behavioral Science* 290; G. Schubert, *Ideologies and Attitudes, Academic and Judicial* (1967), 29 *J. of Pol.* 3.

I. *Guttman Cumulative Scalograms.*

The Guttman cumulative scale⁶ is a technique developed by social psychologists to measure the attitudes of subjects toward social objects, and to locate the subjects on an attitudinal dimension or continuum. An attitude has been defined as an enduring syndrome of response consistency with regard to a set of social objects.

Like many psychological variables, attitude is a hypothetical or latent variable, rather than an immediate observable variable. The concept of attitude does not refer to any one specific act or response of an individual, but is an abstraction from a large number of related acts or responses. For example, when we state that individual A has a less favourable attitude toward labour organizations than individual B, we mean that A's many different statements and actions concerning labour organizations are consistently less favourable to labour than are B's comparable words and deeds. We are justified in using a comprehensive concept like attitude when the many related responses are consistent. That is, if people who disapprove of the closed shop are also likely to want to outlaw strikes, and to oppose minimum wage laws, then it seems reasonable to speak of an anti-labour attitude.⁷

Social psychologists have attempted to measure attitudes by eliciting the verbal responses of subjects to questions or statements which relate to a given social object. For example, to measure attitudes toward foreigners, subjects might be asked to respond to the following series of statements:

I am willing to accept foreigners

1. as visitors to my country;
2. as citizens of my country;
3. as members of my trade;
4. as neighbours;
5. as personal friends;
6. as relatives by marriage.

Individual subjects may indicate that they are willing to admit foreigners to a certain degree of social relationship, but that they will exclude them from any closer relationship. If we assign to each subject, as his score, the number of the last statement to which he assents, indicating the closest relationship to which he is willing to admit foreigners, we are able to compare with one another the

⁶ See references cited in Peck, *loc. cit.*, footnote 2, at pp. 4-11.

⁷ Green, B. F., *Attitude Measurement* in Lindzey, G. (ed.), *Handbook of Social Psychology* (1954), Vol. 1. For a general discussion of attitudes in the theory of social psychology see Newcomb, T. M., *Social Psychology: The Study of Human Interaction* (1965), pp. 1-153.

attitude of each subject. A subject with a score of 6 has a more favourable attitude toward foreigners than one whose score is 2. In this way we are able to measure the attitudes of individuals and to locate each on an attitudinal continuum or dimension.

The statements are cumulative in the sense that each one represents a more favourable attitude than the one which precedes it. Accordingly, it is expected that each subject who responds affirmatively to any statement will respond affirmatively to all statements which precede it, and each subject who responds negatively to any statement will respond negatively to all statements which follow it. Responses which meet these conditions are said to be consistent; those which do not are said to be inconsistent.

A subject might respond affirmatively to statements 1, 2, 3, 5 and 6, but negatively to statement 4. That the response to number 4 is inconsistent, may indicate that it is based on an attitude other than the one under investigation; for example, it may be based on the subject's attitude toward expected changes in property values. This indicates that statement 4 relates to the latter attitudinal dimension, rather than to the one under investigation.

We may use the series of statements as a measure of subjects' attitudes toward foreigners only if the statements relate to that attitudinal dimension and to no other, so that the responses are based on or determined by that attitude; that is, only if the statements are unidimensional. When no inconsistencies occur in the responses, it is likely that all the statements relate to the attitude being investigated, and that the responses are made on the basis of that attitude. However, when inconsistencies occur, it is necessary to devise a test to determine whether all or most of the statements relate to the attitudinal dimension under investigation.

Louis L. Guttman devised a scale which, he suggested, establishes the unidimensionality of the statements contained on it. In constructing a Guttman cumulative scale, a researcher chooses questions or statements which he believes to be samples of the whole range of questions which relate to the attitudinal dimension under investigation, and which he believes to be distributed over the entire range of that dimension. The Guttman cumulative scale is a tabulation of the subjects' responses to those statements or questions.

We may construct a Guttman scale if we assume that five subjects A, B, C, D and E respond to the six statements about foreigners as indicated below. (An affirmative response is designated by a plus sign, and a negative response by a minus sign.)

	A	B	C	D	E
Statement 1	+	+	+	+	—
2	+	+	+	+	—
3	+	+	+	—	—
4	+	—	—	—	—
5	+	+	—	—	—
6	+	+	—	—	—

It is apparent that A's attitude toward foreigners is relatively favourable, and E's unfavourable. The attitudes of C and D fall between the two extremes represented by A and E. The only inconsistent response is that of B to statement 4.

Where the statements on the scale are such that all subjects do, in fact respond consistently, the statements are said to be "scalable". Scalability is taken as evidence that the statements are unidimensional, that is, that the statements relate to a single attitudinal dimension, and that the responses to them are determined by that attitude (in the above example, the attitude to foreigners). Thus, it is said that scalability evidences unidimensionality.

However, in practice, a perfectly consistent scale occurs only rarely. Guttman took the position that as long as the number of consistent responses constitutes more than ninety per cent of the total number of responses, it is likely that the responses are largely determined by a single dominant attitude, although secondary attitudinal dimensions may be responsible for the inconsistencies. Thus, Guttman was willing to accept as scalable, statements on a scale on which at least ninety per cent of the responses are consistent. In a later development, it was proposed that a scale with an observed consistency of ninety per cent or more should be considered scalable only if the observed consistency is significantly greater than the minimum consistency possible given the structure of the scale.⁸

To measure the degree of consistency, Guttman developed a formula for a "coefficient of reproducibility" (R), which indicates in decimal form the percentage of consistency.⁹ A formula for the "minimum marginal reproducibility" (MMR) indicates the mini-

⁸ The minimum consistency possible on any scale is "an empirical function of the extremity and distribution of the marginal frequencies". See G. A. Schubert, *The Judicial Mind*, 1965, North-Western U.P., at p. 79.

⁹ R is calculated by the formula

$$R = 1 - \frac{\text{number of inconsistent responses}}{\text{number of responses}}$$

Responses to any question on the scale are not included in the calculation of R, if eighty per cent or more of those responses are either affirmative or negative. If responses to questions which elicit a nearly unanimous response were counted, the degree of consistency would be spuriously high because the closer the responses approach unanimity, the less possibility there is that some responses will be inconsistent.

imum consistency possible given the structure of the scale.¹⁰ Herbert Menzel¹¹ developed a "coefficient of scalability" (S) which provides another standard of scalability. If R is .90 or greater, the difference between R and MMR is between .15 and .20, and S is .60 or greater, the array of statements is scalable, and the researcher concludes, on the basis of Guttman theory, that the statements are unidimensional, and that the responses are determined by a single dominant attitude. Such an array of statements measures a single attitudinal dimension, and so may be used to measure the intensity of the attitude in subjects, and to locate the subjects along the attitudinal dimension.

Certain judicial behaviouralists¹² in the United States have adapted the theory and method of cumulative scaling for use in the analysis of judicial decisions. In their studies, which concentrate largely on the public law decisions of the Supreme Court of the United States, they assume that judicial decisions are determined by the judges' attitudes toward policy issues and not by their views of the governing statutes, precedents and legal rules. For example, the researcher formulates the hypothesis that judges decide civil liberties cases on the basis of their attitudes toward the deprivation of a civil liberty, rather than on the basis of the legal considerations relevant to each case. Each non-unanimous case raising a civil liberty issue is treated as posing a question in the form, "Shall I allow a deprivation of the claimed civil liberty to the extent represented by this case?" The judges' votes, and not their reasons for judgment, are taken to be their responses to the question posed by each case.

The vote of each judge is classified as affirmative or negative in terms of the attitude which is the subject matter of the hypothesis; for example, a vote will be classified as affirmative if it upholds the civil liberty claim, and as negative if it rejects the claim. The non-unanimous cases are arranged vertically in order of the number of affirmative votes cast in each case; and the judges are arranged horizontally in accordance with the position on the scale of the last consistent affirmative vote cast by each judge.

The measures applicable to Guttman cumulative scales are accepted to determine whether a scale evidences the dominance of a single attitude.¹³ Therefore, if on the scale of civil liberty cases,

¹⁰ G. A. Schubert, *loc. cit.*, footnote 8.

¹¹ A New Coefficient for Scalogram Analysis (1953), 17 Public Opinion Quarterly 268.

¹² See Peck, *loc. cit.*, footnote 2.

¹³ But, see, *infra*, text at footnote 16.

the coefficient of reproducibility is .90 or more and is significantly higher than the minimum marginal reproducibility, and the coefficient of scalability is .60 or more, the judicial behaviouralist concludes in accordance with Guttman theory that civil liberty cases are scalable, that they are unidimensional, (that is, that they all relate to the same attitudinal dimension), and, accordingly, that all the judges reach their decisions in civil liberty cases on the basis of a single dominant attitude—their attitude toward civil liberties. Thus, the researcher concludes that the hypothesis is verified.

The behaviouralists take the scale to indicate the attitude of each judge in relation to that of every other judge. The judge at the extreme left is the one who casts the greatest number of affirmative votes; the judicial behaviouralists claim that he exhibits the most favourable attitude to the issue raised by the cases. The remainder of the judges are ranked from left to right on the scale in accordance with the number of affirmative votes cast by each; the behaviouralists argue that the order in which the judges are ranked indicates the extent to which the attitude of each favours civil liberty claims. Thus, if an affirmative vote is defined as a "liberal" vote, the scale is taken to indicate which judges are "liberal", which are "conservative" and which are "moderate". The description of any judge as "liberal", "conservative", or "moderate" is, of course, relative to the composition of the court, and to the extremity of the civil liberty claims raised in the cases before the court.

The scale directs the researcher's attention to cases containing inconsistent votes. If a vote is inconsistent because it is based on an attitude other than the one measured by the scale, the second attitude may perhaps be identified through the use of subscales. A second attitude may influence the judges' votes in a case which involves more than one issue; for example, if a case on the civil liberties scale raises an issue of states' rights, the judges' votes in that case may be influenced by their attitudes toward states' rights as well as by their attitudes toward civil liberties. It is possible to construct a subscale which contains only those cases on the main scale which raise both issues. The behaviouralists claim that the subscale enables them to investigate the extent to which the decisions in those cases are affected by the attitude to each issue.¹⁴

Although the judicial behaviouralists in the United States accept the proposition that the scalability of related judicial decisions

¹⁴ See Peck, *loc. cit.*, footnote 2, at pp. 16 to 19.

evidences unidimensionality,¹⁵ they have long recognized, as have concerned statisticians and mathematicians, that a uniform criterion for testing scalability is lacking.¹⁶ In view of the convincing body of opinion and evidence to suggest that for scales of judicial decisions, scalability does not evidence unidimensionality, I concluded in an earlier study¹⁷ that lawyers should not accept the view that the production of an acceptable scale establishes that judges reach their decisions on the basis of their attitudes.

Nevertheless, 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 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. Subscales may enable the researcher to isolate groups of cases which contain a common secondary issue, and to focus upon voting patterns in those cases. Thus, scalogram analysis may enable the researcher to discover that certain relationships exist between judges' votes and the policy issue raised by the cases; for example, that the *effect* of most of the votes of some judges is consistently to uphold (or, to oppose) certain claims, and that the *effect* of the votes of other judges is sometimes to uphold and sometimes to oppose such claims.

An instrument which describes the effect of judicial votes on policy issues is valuable although it does not in itself explain why the judges vote as they do, because it may assist the researcher to arrive at such an explanation. Having discovered a relationship between the judges' votes and the value raised by the cases, the researcher will be able to examine its significance. He will pay particular attention to judges who consistently decide cases in favour of a certain value, that is, who consistently uphold or oppose a certain type of claim and consequently appear near the extreme left or right side of the scale, for there is a greater likelihood that such judges decide cases on the basis of their attitudes toward values.¹⁸ By analysing the issues, the reasons for judgment,

¹⁵ *Ibid.*, at pp. 11-19.

¹⁶ See Schubert, *loc. cit.*, footnote 5, at pp. 16, 23-25, and earlier references cited therein; Tanenhaus, *loc. cit.*, footnote 5, at p. 1593.

¹⁷ For a discussion of some of the relevant considerations, see Peck, *loc. cit.*, footnote 2, at pp. 19-22.

¹⁸ W. Mendelson, *loc. cit.*, footnote 5, at p. 598. But, see Schubert's discussion of the justices in the middle ranks of a scale, *loc. cit.*, footnote 5, at pp. 34-37. The view that only the respondents at the extremes of the scale

the unanimous cases not on the scale, and the voting behaviour in the scaled cases, he may conclude that some judges do reach their decisions on the basis of their attitudes to the values involved.

To assess the significance of the voting patterns described by a scalogram, it is necessary to bear in mind the characteristics of a scalogram and the limitations which derive from those characteristics.

First, the scale contains only those decisions in which the court divides. It does not include appeals in which a single "judgment of the court" is given, or appeals in which two or more judges give separate reasons for judgment but all participating judges vote in the same way.¹⁹ As divided decisions form a small minority of all decisions reported in any year,²⁰ the scalogram omits most of the decisions of the court. On the other hand, those cases which give rise to disagreement on the court clearly warrant special attention.

Secondly, the choice of cases to be included on a scale is, within certain broad limits, a matter for the discretion of the researcher. The voting patterns shown by the scalogram will, of course, depend on the choice made. In constructing the scalograms presented in this article, the author considered all cases identified by the editors of the *Supreme Court Reports* with catch-words relevant to taxation, negligence, or criminal law, and referred in a footnote to all such cases not included on the scale.

Thirdly, the preparation of a scale requires that the researcher abstract from a series of cases (many of which may raise more than one issue) a single issue, for example, a claim by an accused in a criminal appeal for his liberty, and to classify each justice's vote in each case in terms of that issue, that is, as upholding or rejecting the claim. An individual justice may base his vote on a

respond on the basis of their attitudes is inconsistent with Guttman theory. However, the position I take in the text is consistent with the view that the scalability of judicial decisions does not evidence unidimensionality (*supra*, footnote 17), and that scales of decisions of the Supreme Court of Canada are not cumulative (*infra*, text at footnote 34).

¹⁹ Such appeals may be included on a scale if it is found that although all judges vote in the same way, some judges appear in their reasons for judgment to be more affirmative or negative (in terms of the scale classification) than others. No attempt was made to include such appeals on the scales presented in this article.

²⁰ The 1966 volume of the Supreme Court Reports contains fifty judgments of the court, twenty-four divided decisions, and six unanimous decisions containing more than one set of reasons for judgment. The corresponding figures for the other volumes considered in this article are: 1965—40, 34, 6; 1964—55, 18, 6; 1963—62, 17, 4; 1962—62, 19, 12; 1961—43, 14, 21; 1960—43, 22, 14; 1959—48, 17, 14; 1958 (appeals heard on or after January 15th, 1958)—13, 15, 14. Each of the volumes for 1958, 1961, 1962, 1964 and 1965 contains one judgment of a single judge in chambers.

different issue in the case—the adequacy of the charge, a technical rule of law, the construction of a statute, or the question whether the court has jurisdiction. Indeed, in cases on the criminal law scale, *infra*, the issues discussed by the justices are generally of this sort, and rarely, if ever, a simple question of guilt or innocence. A judge whose vote is classified as negative may not *intend* to vote against the claim of an accused, except in the sense that he knows that his vote on the other issue has the effect of rejecting that claim.²¹ On the other hand, the classification describes the effect of the vote as rejecting the claim, and the scale shows the effect of all justices' votes on all such claims in divided decisions.

Fourthly, within broad limits, the analyst has some choice in ordering the cases on the scale. The voting pattern described for each judge by the scale will depend upon how that choice is exercised. Thus, scales may be said to be indeterminate in the sense that different analysts, using the same cases, may produce different scales, that is to say, different descriptions of the justices' voting behaviour.

Cases are ordered in accordance with the proportion of affirmative votes they contain, on the assumption that a case with proportionately more affirmative votes raises a less extreme claim than a case with proportionately fewer affirmative votes—less extreme because a relatively larger number of justices supported it.²² This method of ordering is followed in an attempt to place each case on the scale above every other case containing a less extreme claim. Such a placement of cases is necessary to produce a cumulative scale.²³

The development of rules²⁴ governing the ordering of cases on a scale has reduced, but not eliminated the element of indeter-

²¹ This is one consideration negating the view that a scale indicates directly the justices' attitudes to claims by accused persons. For a further discussion of the implications of focusing on votes rather than opinions, see Peck, *loc. cit.*, footnote 2, at p. 23, and references cited therein.

²² But see J. Tanenhaus, *loc. cit.*, footnote 5, at p. 1590. Tanenhaus suggests that the assumption is not justified. This criterion, of course, assumes that justices vote in accordance with their attitudes to the claim, an assumption which is made in Guttman theory, and by the judicial behaviouralists in the United States. I argue, *supra*, footnote 17, that the view that justices vote according to their attitudes is not justified as an assumption, or as a conclusion based solely on the ground that cases produce an acceptable scale, although it *may* be justified as a conclusion about some judges in some cases, where all the circumstances warrant such a conclusion.

²³ See discussion of Guttman cumulative scales, *supra*.

²⁴ G. A. Schubert, *Quantitative Analysis of Judicial Behavior* (1959), Glencoe Free Press, pp. 282-283; and *loc. cit.*, footnote 5, at pp. 21-22. H. J. Spaeth, *loc. cit.*, footnote 5, at pp. 299-301.

minacy which results from the discretion exercised by the analyst. The scales presented in this article were constructed in accordance with the following method (with certain exceptions discussed, *infra.*). All cases were placed in groups according to the voting division of the justices, for example, all cases with four affirmative votes and one negative vote were placed in one group. The cases in each voting division group were placed on the scale in accordance with the ratio of affirmative to negative votes in each group, each group being placed above any other group containing a lower ratio of affirmative to negative votes. Cases within each group were arranged first to eliminate inconsistent votes, and thereafter in accordance with the date of judgment.

If this method is followed without exception, the degree of indeterminacy which results from the exercise of discretion by the analyst, is reduced to a single situation: that is, a case containing an inconsistent vote which the analyst may assign to either one of two justices²⁰ depending on the position in which he places the case. As a meaningful assignment of the inconsistent vote depends on the particular characteristics of the individual case and justices concerned,²¹ it is undesirable to lay down a mechanical rule to govern the positioning of such a case; therefore, the choice must be left with the analyst.

Spaeth proposes that cases be ordered on the basis of the "expected" voting division in each case, *i.e.*, the vote that would have resulted if all justices participated in each case and voted consistently. I did not attempt to apply this method in constructing the scales here, as it requires the imputation of votes to non-participating justices. In view of the large number of non-participations on scales of decisions of the Supreme Court of Canada, the imputed votes would outnumber the actual votes.

Schubert, *loc. cit.*, footnote 5, at p. 21, argues that the development of computer programmes makes obsolete the procedures of scale construction discussed here. Spaeth, in conversation with the author, expressed the view that, as the computer programmes developed to date were devised to prepare scales containing large numbers of respondents, they are not suitable for the construction of scales of judicial decisions.

²⁰ See, for example, the votes of Cartwright and Ritchie JJ. in case no. 66-384 of the Taxation scale *infra*. The inconsistent vote was assigned to Cartwright J. by placing case no. 66-384 below case no. 64-177. If case no. 66-384 were placed below case no. 59-548, the inconsistent vote would result to Ritchie J. Similarly, if case no. 66-479 on the same scale were placed below 64-177, the inconsistent vote would result to Ritchie J. rather than Spence J.

²¹ Spaeth suggests six circumstances to be considered in the assignment of inconsistencies when an option exists: the possibility that a justice perceives the issue in a case as raising a value other than the value in terms of which the scale is constructed; the existence of a previous pattern of inconsistent responses in cases containing a consistent sub-element; the possibility that the case presents a new and complex question for decision; the previous rank of the justices on the issue; whether one of the two justices often responds inconsistently, and the length of service on the court of each justice; *loc. cit.*, footnote 5, at pp. 301-303.

Accordingly, a degree of indeterminacy (resulting from the analyst's exercise of discretion) in the ordering of cases and hence in the description of the justices' voting patterns cannot be eliminated. The scope of the indeterminacy will vary directly, not only with the number of such cases on a scale, but also with the number of cases and non-participations in the voting division group.²⁷ As scales of decisions of the Supreme Court of Canada have many non-participations,²⁸ (resulting from the court's practice of sitting in panels) such scales and the voting patterns they describe are less determinate (that is, more dependent on the analyst's discretion), than are scales of decisions of the United States Supreme Court.

Furthermore, the degree of indeterminacy is increased if the analyst departs from the rule requiring the chronological ordering of cases in each voting division group (after the number of inconsistent votes in the group is reduced to a minimum). Nevertheless, there is reason to suggest that this rule should not be followed invariably. Although the rule decreases the subjective discretionary element in scalogram analysis, it introduces a mechanical element in case ordering which may, on occasion, distort the voting pattern described by the scale. Selectivity in the application of the rule is particularly important in the construction of scales of decisions of the Supreme Court of Canada, as adherence to the rule is more likely to distort voting patterns on a scale containing many non-participations.²⁹ I suggest, therefore, that the rule should not be followed in circumstances which indicate that a departure from it will produce a scale which presents a more accurate description of the justices' voting behaviour.

If it is objected that departure from the rule opens the door

²⁷ The number of possible positions for any case increases with the size of the voting division group. Where there are many non-participations (blanks in the scale), it is less likely that movement of any case will result in the creation of additional inconsistent votes; therefore, greater movement is possible.

²⁸ See the scales presented *infra*.

²⁹ For example, adherence to the rule will artificially lower a justice's break-point if the justice did not participate in any of the early cases within the voting division group in which his break-point occurs. The last consistent affirmative vote which determines the position of the break-point will be separated from the second last consistent affirmative vote by the early cases in which he did not participate. On the T scale, *infra*, compliance with the rule would require that cases nos. 58-577, 59-548 and 59-850 be placed in that order following case no. 60-735. If the cases were positioned in that way, Ritchie and Spence JJ. would have lower break-points and higher scale scores than they have on the present scales, a result which, considering their voting divisions, would describe their voting patterns less accurately than does the present T scale.

to the production of different scales of the same cases, one can reply only that that result flows from the limitations of scalogram analysis, especially, perhaps, when applied to decisions of a court which sits in panels. The possibility of producing competing scales which differ from each other, the validity of which must be assessed on the basis of the reasons put forward by the researchers, seems to be preferable to the construction of a single scale, put forward as the only possible scale, with a claim to validity which is based upon a rule, which, while not without certain advantages, cannot be theoretically justified.

The remaining matter to consider in assessing the meaning of a scalogram is the classification of the voting patterns of individual justices. The justices appear on the scale from left to right in accordance with the location of the break-point of each justice, that is, the point at which a justice ceases to vote consistently affirmative and begins to vote consistently negative.³⁰ The lower a justice's break-point on the scale, the closer to the left of the scale he will be.

Each justice's voting pattern may be classified according to his scale score,³¹ a numerical value reflecting the position of the justice's break-point. The scale score may range from +1.00 (where the break-point occurs in the last case on the scale), through 0 (where it occurs in the middle case) to -1.00 (where it occurs in the first case). On the basis of his scale score, the effect of a justice's voting pattern may be classified as strongly in favour of the affirmative value (1.00 to .60), in favour of the affirmative value (.59 to .20), neutral (.19 to -.19), in favour of the negative value (-.20 to -.59) or strongly in favour of the negative value (-.60 to -1.00).

There are reasons to suggest that for a scale of decisions of the Supreme Court of Canada, the justices' scale scores, based on their break-points, should not be taken as the sole measure of their individual voting patterns. Voting patterns may be measured

³⁰ Where non-participations occur between a justice's last consistent affirmative vote and his first consistent negative vote, the break-point line is drawn midway between the two votes. In the case of a justice for whom that is necessary, the scalogram locates a break zone rather than a break-point, and the voting pattern described is less precise. A similar problem arises for judges who cast no affirmative votes and have non-participations prior to their first negative vote.

³¹ Scale score is calculated by the formula

$$\text{scale score} = \frac{2 \times \text{scale position}}{\text{number of cases on the scale}} - 1$$

(where scale position equals the position of a justice's last affirmative consistent vote.)

on the basis of break-points only on scales containing items which are arranged cumulatively, that is, only on true Guttman cumulative scales. If the items are not arranged cumulatively, it cannot be said that a subject with a low break-point has responded affirmatively to more extreme claims than a subject with a high break-point. Accordingly, if the items are not arranged cumulatively, the scale scores do not afford a meaningful measure of the voting patterns.

It is plausible to argue³² that cases ordered in accordance with the proportion of affirmative votes which they contain, are cumulative, where (as in the United States Supreme Court) all cases are decided by the full court.³³ However, where, as in the Supreme Court of Canada, the cases are decided by different panels of judges, the number of affirmative votes cast in any case may be a function, not of the extremity of the claim in that case, but of the attitudes of the particular justices who hear it. Accordingly, there is no reason to believe that when the cases are ordered on the basis of voting division, they have been arranged cumulatively. My argument here is, in effect, that scales of decisions of the Supreme Court of Canada may not be Guttman scales because the cases of which they are composed may not be ordered in accordance with the extremity of the claims raised.³⁴

If that is true, it follows that on scales of decisions of the Supreme Court of Canada, scale scores should not be accepted as the sole measure of the effect of a justice's voting pattern. Accordingly, I propose that a justice's voting division be used as a second measure of the effect of his voting pattern. On the basis of the voting division, a justice's voting pattern may be classified as strongly in favour of the affirmative value (if the justice votes affirmatively in eighty per cent to one hundred per cent of the cases in which he participates) in favour of the affirmative value (sixty per cent to seventy-nine per cent), neutral (forty-one per cent to fifty-nine per cent), in favour of the negative value (twenty-one per cent to forty per cent), or strongly in favour of the negative value (zero per cent to twenty per cent).

³² This argument assumes that the justices base their decisions on their attitudes to the value raised by the cases. See *supra*, footnote 22.

³³ But see Tanenhaus, *loc. cit.*, footnote 5, at pp. 1590-1591.

³⁴ Of course, it is possible that cases on such scales will, in fact, be ordered cumulatively. Evidence of such an ordering will exist where participation of all the justices (or at least of justices with all voting patterns represented on the scale) are distributed along the scale. If the scalograms do not approximate Guttman cumulative scales, then, of course, there is no basis whatever for the claim that scalability establishes unidimensionality.

I propose that the scale score and voting division be used as complementary measures. To avoid overstatement, I propose that, where the two measures characterize a voting pattern in different ways,³⁵ the voting pattern should be classified according to the measure which results in the less extreme characterization, unless special circumstances warrant classification according to the measure which gives the more extreme result.³⁶

The classification of the voting pattern of any judge on the basis of these measures is relative to the composition of the court and to the nature of the appeals which came before the court. Thus, the description of any justice's voting division as, for example, "in favour of the affirmative value" is meaningful only as a means of comparing that justice's voting behaviour with the voting behaviour of other justices on the scale, and only as a description of his voting behaviour in appeals raising claims of the sort which were raised in the appeals on the scale. Further, the numerical limits of each classification are chosen arbitrarily as a matter of definition to make classification possible. Although it is necessary to decide where the lines shall be drawn and to adhere to that decision when classifying voting patterns, the voting patterns in different classifications *may* not be fundamentally different; the categories are not sharply divided but merge with each other. One cannot, of course attribute great weight to small numerical differences, especially where the quantity of data (that is, the number of cases), is small. Finally, although numerical values involving decimal fractions and percentages have been used to

³⁵ The two measures indicate the same classification of all voting patterns, if all justices participate and vote consistently in all cases. Under those conditions, any justice who has a lower break-point than any other justice (and therefore a more affirmative scale score), will necessarily have a larger proportion of affirmative votes.

On true Guttman cumulative scalograms, as all subjects normally respond to all questions and as ninety per cent of all votes must be consistent, the two measures will give the same results. Similarly, the two measures will normally give the same results on scales of decisions of the United States Supreme Court which, too, contain comparatively few non-participations. See G. A. Schubert, *loc. cit.*, footnote 8, at pp. 104-112. Scales of decisions of the Supreme Court of Canada contain a relatively large number of non-participations (see *infra*). Thus, a justice may have a lower break-point and a more affirmative scale score than another justice although he casts a larger proportion of negative votes. (Compare Ritchie J. and Fauteux J. on the Negligence scale.)

³⁶ For example, classification on the basis of voting division may give a less extreme result than classification on the basis of scale score, solely because the voting division is moderated by inconsistent votes which may be explained as votes clearly based on a secondary issue. In such a case, classification on the basis of the more extreme result appears to be justified. Cf. Mr. Justice Judson's voting pattern on the N. scale *infra*.

classify voting patterns, it is not claimed that the resulting classifications have mathematical precision.

In summary, I have argued that a scalogram should be taken, *prima facie*, only as describing the effect of justices' votes on a particular type of claim or value raised by a group of cases. Regarded alone, the scalogram does not indicate directly the justices' attitudes to the value; nor does it establish that the justices decide cases on the basis of their attitudes, although it may suggest the possibility that they do. Such a possibility must be assessed in the light of the reasons for judgment in the scaled cases, the unanimous decisions which do not appear on the scale, and the whole range of legal and sociological insights which are revealed by a traditional and realist analysis of the cases. When we assess the significance of the voting patterns identified by scalograms, we must bear in mind the limitations which flow from the indeterminate elements in scales, that is, the subjective discretionary choices which enter into the selection of cases, the ordering of cases and, consequently, the ranking of the justices. In making that assessment, Canadian lawyers must note particularly that the large number of non-participations on scales of Canadian decisions detracts to a degree from the descriptive value of the scales, and increases the scope of indeterminacy in scale construction. Finally, the reader must bear in mind that the scales contained in this article are not put forward as the only possible scalograms of the relevant cases. Further evaluation of the cases and of the limitations of scalogram analysis when applied to the Supreme Court of Canada, may suggest that other scalograms, differently constructed, will present a more accurate picture of the work of the court.

On the other hand, the scalograms in this article are put forward with confidence that they present a meaningful picture of the effect of the justices' votes in a significant group of cases in the three areas investigated, and that they throw light on the nature of judicial decision-making by the members of the court. The voting pattern described for each justice on the scale indicates the effect of that justice's votes in a group of appeals in which the court was called upon to pass judgment on a certain type of claim or value, and in which the members of the court were not in agreement. In terms of legal analysis, the results in the appeals contained on each scale turned on the justices' views of a large number of diverse legal issues involving the construction and application of statutes, the ascertainment (or creation) and application of rules of law and the assessment of inferences drawn from the

facts by different trial judges. Under these circumstances, when a scale indicates that certain justices uphold or deny a given claim in a large majority of cases in which they participate, we must face the question whether their decisions are based on particular statutes and legal rules, or on their attitudes towards that claim.

II. *Scalogram Analysis of the Work of the Supreme Court of Canada.*

I wish now to present and discuss scalograms of recent taxation, negligence and criminal law decisions of the Supreme Court of Canada. Each scalogram contains relevant appeals heard by the court after January 15th, 1958 and reported in the 1958 to 1966 volumes of the *Supreme Court Reports*. A period starting on January 15th, 1958, was selected as only three justices (Kerwin C.J., and Rand and Locke JJ.) on the court on that date left the court up to the time of writing.³⁷ The period chosen is long enough to contain a moderately large number of appeals of each type, and short enough to limit the number of judges represented on the scales to twelve. A scale covering a longer period will contain decisions of a larger number of justices and, therefore, a larger number of non-participations.³⁸ The scalograms produced below cover the entire terms of office of Martland, Judson, Ritchie, Hall and Spence JJ., two-thirds of Mr. Justice Abbott's term of office, one-half of Mr. Justice Cartwright's and Mr. Justice Fauteux's terms of office and not quite one-third of Chief Justice Taschereau's term of office.³⁹ Accordingly, conclusions drawn about the voting behaviour of Taschereau C.J. and Cartwright, Fauteux and Abbott JJ. must remain tentative until all relevant decisions of these justices during their entire terms of office have been studied.

On the scalograms, each justice is designated by the first letter of his surname, with the exception of Rand J., for whom the letters

³⁷ Kerwin C.J. died on February 2nd, 1963. Rand J. retired on April 27th, 1959, and Locke J. on September 18th, 1962.

³⁸ For example, a scalogram for the period beginning December 22nd, 1949, the date of appointment of Cartwright and Fauteux JJ., will cover the entire terms of all justices currently on the court other than Taschereau C.J., but will also include decisions of Rinfret C.J., and Estey, Kellock and Nolan JJ., in addition to those of Kerwin C.J. and Rand and Locke JJ.

³⁹ The justices on the court on July 1st, 1967 and their dates of appointment are as follows: Taschereau C. J. (February 9th, 1940); Cartwright and Fauteux JJ. (December 22nd, 1949); Abbott J. (July 1st, 1954); Martland J. (January 15th, 1958); Judson J. (February 5th, 1958); Ritchie J. (May 5th, 1959); Hall J. (November 23rd, 1962), and Spence J. (June 11th, 1963).

Ra are used, to avoid confusion with Ritchie J. Each case is designated by the year and page number of its location in the *Supreme Court Reports*. Thus, the designation 58-441 indicates the appeal reported in [1958] S.C.R. 441.

A) The Taxation Scale

The Taxation Scale (T)⁴⁰ contains twenty-eight divided decisions in taxation appeals heard by the Supreme Court of Canada after January 15th, 1958, and reported in the 1958 to 1966 volumes of the *Supreme Court Reports*. The T scale includes fourteen cases arising under the federal Income Tax Act,⁴¹ six cases arising under the federal Excise Tax Act,⁴² three cases concerning federal death duties,⁴³ one case arising under the federal Customs

⁴⁰ I have omitted from the T scale *Guay v. Lafleur*, [1965] S.C.R. 12. The majority (Taschereau C.J., and Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.) held that notwithstanding s. 2(e) of the Canadian Bill of Rights, S.C., 1960, c. 44, and the requirements of procedural natural justice, a taxpayer was not entitled as of right to be present at an inquiry into his affairs conducted under s. 126(4) and (8) of the Income Tax Act, R.S.C., 1952, c. 148. Hall J. dissented. The reasons for judgment indicate that the justices viewed the appeal as turning on the question whether the inquiry was a judicial or administrative inquiry, and not on the fact that it was held pursuant to the Income Tax Act.

⁴¹ R.S.C., 1952, c. 148. *North Bay Mica Co. Ltd. v. M.N.R.*, [1958] S.C.R. 597; *Evans v. M.N.R.*, [1960] S.C.R. 391; *Irrigation Industries Ltd. v. M.N.R.*, [1962] S.C.R. 346; *Montreal Trust v. M.N.R.*, [1962] S.C.R. 570; *Premium Iron Ores Ltd. v. M.N.R.*, [1966] S.C.R. 685; *M.N.R. v. Imperial Oil Ltd.*, [1960] S.C.R. 735; *M.N.R. v. Sedgwick*, [1964] S.C.R. 177; *Highway Sawmills Ltd. v. M.N.R.*, [1966] S.C.R. 384; *Curran v. M.N.R.*, [1959] S.C.R. 850; *Regal Heights Ltd. v. M.N.R.*, [1960] S.C.R. 902; *Orlando v. M.N.R.*, [1962] S.C.R. 261; *Oxford Motors Ltd. v. M.N.R.*, [1959] S.C.R. 548; *Canadian General Electric v. M.N.R.*, [1962] S.C.R. 3; *Falconer v. M.N.R.*, [1962] S.C.R. 664.

⁴² R.S.C., 1952, c. 100. *The Queen v. Premier Mouton Products Inc.*, [1961] S.C.R. 361; *Pfizer Corporation v. The Queen*, [1966] S.C.R. 449; *The Queen v. Mead Johnson of Canada Ltd.*, [1966] S.C.R. 457; *The Queen v. Beaver Lamb and Shearling Co. Ltd.*, [1960] S.C.R. 505; *Deputy Minister of National Revenue (Customs and Excise) v. Consolidated Denison Mines Ltd. and Rio Tinto Mining Co. of Canada*, [1966] S.C.R. 8; and *Rexair of Canada Ltd. v. The Queen*, [1958] S.C.R. 577.

⁴³ *Toronto General Trusts Corporation v. M.N.R.*, [1958] S.C.R. 499; *M.N.R. v. Smith*, [1960] S.C.R. 477, and *M.N.R. v. Bickle*, [1966] S.C.R. 479.

⁴⁴ R.S.C., 1952, c. 58; Customs Tariff Act, R.S.C., 1952, c. 60. *Dominion Engineering Works Ltd. v. Deputy Minister of National Revenue and A. B. Wing Ltd.*, [1958] S.C.R. 652. On appeal by A. B. Wing Ltd., against the imposition of customs duty with respect to a power shovel which it imported, the Tariff Board reversing the decision of the Deputy Minister of National Revenue, imposed a lower rate of duty. On further appeal to the Exchequer Court ([1956] Ex. C.R. 379), and the Supreme Court of Canada by Dominion Engineering Works Limited, an intervenor, the Deputy Minister, notwithstanding that the Tariff Board had reversed his decision, appeared as respondent, supporting the Board's decision as one based on a finding of fact and, therefore, not subject to judicial review under the Customs Act, s. 45. Although the majority justices dismissed the appeal (there-

Act,⁴⁴ one case arising under the British Columbia Social Services Tax Act,⁴⁵ and three cases arising under municipal taxing by-laws.⁴⁶

The T scale is constructed to make possible an examination of the effect of the justices' votes on demands made by government for the payment of taxes, and on attempts by taxpayers to resist such demands. A vote favouring the taxpayer's attempt to resist payment or reducing the amount payable is classified as affirmative, and a vote favouring the government's claim is classified as negative. Accordingly, an affirmative vote upholds the interest of the taxpayer, whether an individual, or a business organization,⁴⁷ against the claims of government, and, speaking generally, favours individual and corporate enterprise and the retention of wealth by those who have acquired it through industry, investment, or good fortune. A negative vote, upholding a claim for taxes, is one which supports the revenue demands of government and thereby makes possible the fulfilment of government commitments and the expansion of government functions, including the expansion of social services. At least where the tax imposed is "progressive", a negative vote tends to redistribute wealth from those who have more to those who have less.

The R and S coefficients⁴⁸ are .93 and .77 respectively. As the difference between the observed consistency and the least possible consistency (computed for cases)⁴⁹ given the structure of the scale is .20, the increase in consistency is considerable. Therefore, if the scale is taken to be a cumulative scale and if scalability at the conventional levels is accepted as establishing unidimensionality, one would conclude that the scale indicates that the justices reach their decisions on the basis of their attitudes to taxation. As I indicated above, I am not prepared to draw such a conclusion from scales of decisions of the Supreme Court of Canada.⁵⁰

by, in effect, upholding the Deputy Minister's submission) I classify their votes as affirmative, as they affirmed the imposition of a lower rate of duty.

⁴⁴ R.S.B.C., 1948, c. 333, ss. 3(1), 5(h); *The Queen v. Alaska Pine and Cellulose Ltd.*, [1960] S.C.R. 686.

⁴⁵ *Seneca and Cayuga Separate School Board of Trustees v. Township of Seneca*, [1964] S.C.R. 569; *Worldwide Evangelization Crusade v. Beamsville*, [1960] S.C.R. 49, and *Ottawa v. Royal Trust Company*, [1964] S.C.R. 525.

⁴⁷ But note that in *Seneca and Cayuga Separate School Board of Trustees v. Seneca*, *ibid.*, the taxpayer school board, was itself an organ of government.

⁴⁸ I have included in the computation of R, decisions in which the court divided 4-1 and 1-4. But see, *supra*, footnote 9.

⁴⁹ MMR for justices is .68; MMR for cases is .73.

⁵⁰ See *supra*, text, at footnote 17; and footnote 34.

		TAXATION SCALE (T)												
Voting Division		.78	.58	.50	.56	.53	.40	.60	.22	.30	.25	.14		
Scale score		.89	.54	.39	.14	.071	.036	-.036	-.43	-.57	-.75	-.75		
		C	T	R	S	M	H	L	A	K	F	J	Ra	
Toronto Gen. Trusts	58-499	+				(-)		+		+		+	4-1	
Dom. Eng. Works	58-652		+			+					+	+	4-1	
Alaska Pine	60-686	(-)				+			+	+		+	4-1	
Can. Gen. Elec.	62-3	+		+		+		+	(-)			+	4-1	
Seneca & Cayuga	64-569	+			+		+		+				4-1	
Smith	60-477		+						+	+			3-2	
North Bay Mica	58-597	+				+			+				3-2	
Worldwide Evang.	60-49	+				+		+					3-2	
Evans	60-391	+	+	+									3-2	
Premier Mouton	61-361	+	+								(+)		3-2	
Irrigation Ind.	62-346	(-)	+			+		+					3-2	
Falconer	62-664	+				+		+					3-2	
Montreal Trust	62-570		(-)			+		+					3-2	
Premium Iron Ores	66-685			(-)	+	+	+						3-2	
Imperial Oil	60-735	+	(-)	+		+	+						3-4	
Sedgwick	64-177				+	+							1-4	
Highway Sawmills	66-384	(-)		+	+	+							1-4	
Pfizer Corp.	66-449			+	+								1-4	
Mead Johnson	66-457			+	+								1-4	
Curran	59-850		+	+	+								1-4	
Beaver Lamb	60-505		+	+	+								1-4	
Regal Heights	60-902	+	+	+	+								1-4	
Orlando	62-261	+	+	+	+								1-4	
Denison Mines	66-8	+	+	+	+								1-4	
Rexair of Canada	58-577	+	+	+	+								1-4	
Oxford Motors	59-548	+	+	+	+								1-4	
Bickle	66-479	+	+	+	+								1-4	
Royal Trust Co.	64-526	-	-	-	(+)	-	-	-	-	-	-	-	1-8	
28 appeals		+	14	7	5	10	2	6	4	3	2	3	0	
		-	4	5	7	9	3	4	14	7	6	19	1	
		18	12	14	9	19	5	10	18	10	8	22	1	

R = .93
S = .77
R-MMR (computed for cases) = .20

+ = pro-taxpayer
- = pro-government
() inconsistent votes are shown in brackets

146 participations

R = .93

S = .77

R—MMR (computed for cases) = .20

+ = pro-taxpayer

- = pro-government

() inconsistent votes are shown in brackets

146 participations

INCOME TAX SUBSCALE (I)

Voting division		.80	.50	.63	.67	.64	.50	.57	.13	0.00	0.00	0.00	—
Scale score		1.00	.64	.50	.29	.14	.071	-.071	-.57	-.86	-.93	-.93	—
		C	T	R	S	M	H	L	A	F	K	J	Ra
Can. Gen. Elec.	62-3	+		+		+		+	(—)				4-1
North Bay Mica	58-597	+				+			+				3-2
Evans	60-391	+	+	+									3-2
Irrigation Ind.	62-346	(—)	+			+		+					3-2
Falconer	62-664	+				+		+	—				3-2
Montreal Trust	62-570		(—)	+		+		+					3-2
Premium Iron Ore	66-685			(—)	+	+	+		—				3-2
Imperial Oil	60-735	+	(—)	+		+	+	—					3-4
Sedgwick	64-177				+	—	—		—				1-4
Highway Sawmills.	66-384	(—)		+	—	—			—				1-4
Curran	59-850		+	—	—	—		—					1-4
Regal Heights	60-902	+	—	—		—				—			1-4
Orlando	62-261	+	—	—					—				1-4
Oxford Motors	59-548	+				—		—	—	—			1-4
14 appeals		+	8	3	5	2	7	1	4	1	0	0	0
		—	2	3	3	1	4	1	3	7	3	3	11
			10	6	8	3	11	2	7	8	3	3	11

R = .92

S = .67

R—MMR (computed for justices) = .17

+ = pro-taxpayer

— = pro-government

() inconsistent votes are shown in brackets

72 participations

EXCISE TAX SUBSCALE (E)

Voting division		1.00	.67	.50	.50	1.00	0.00	0.00	0.00	0.00	0.00	—	—
Scale score		1.00	.33	0.00	-.33	-.50	-.83	-.83	-.83	-1.00	-1.00	—	—
		C	T	R	F	L	S	M	J	A	K	H	Ra
Premier Mouton	61-361	+	+		+		—	—	—	—	—		3-2
Pfizer Corpn.	66-449			+		—	—	—	—	—			1-4
Mead Johnson	66-457			+		—	—	—	—	—			1-4
Beaver Lamb	60-505		+	—	—	—					—		1-4
Denison Mines	66-8	+	—	—			—			—			1-4
Rexair of Canada	58-577	+						—	—	—	—		1-4
6 appeals		+	3	2	2	1	0	0	0	0	0		
		—	0	1	2	1	1	3	3	3	5	3	
		3	3	4	2	1	3	3	3	5	3		

R = 1.00

S = 1.00

R—MMR (computed for justices) = .13

+ = pro-taxpayer

— = pro-Crown

() inconsistent votes are shown in brackets

30 participations

In spite of the incidence of non-participation⁵¹ resulting from the court's practice of sitting in panels, the T scale identifies with relative clarity four types of voting behaviour.

1. The voting pattern described for Mr. Justice Cartwright is identified as pro-taxpayer on the basis of his voting division of fourteen affirmative and four negative votes (.78 affirmative). There appears to be no reason to adopt the more extreme classification, highly pro-taxpayer, which is suggested by his scale score of .89, which reflects his break-point located close to the bottom of the scale.

2. The voting patterns described for Taschereau C.J. and for Ritchie, Spence, Martland and Hall JJ. may be classified as neutral as between taxpayer and government.

(a) The voting patterns of Taschereau C.J. and Ritchie J. are identified as pro-taxpayer on the basis of their scale scores of .54 and .39 respectively. However, we adopt the more moderate classification of neutral, indicated by the voting divisions of seven affirmative and five negative votes (.58 affirmative) for the Chief Justice, and seven affirmative and seven negative votes (.50 affirmative) for Ritchie J.⁵² (Chief Justice Taschereau's voting division measure is just below the minimum of .60 which we define as pro-taxpayer).

(b) Mr. Justices Spence, Martland and Hall exhibit voting patterns which are neutral as between taxpayer and government both on the basis of their scale scores and their voting divisions. Mr. Justice Spence has a scale score of .14 and a voting division of five affirmative as against four negative votes (.56 affirmative). Mr. Justice Martland has a scale score of .071, and a voting division of ten affirmative and nine negative votes (.53 affirmative). Although Mr. Justice Hall is located within the neutral group, it is suggested that, as he participated in only five cases, any conclusions drawn about his voting pattern are highly tentative and must await confirmation as further data appears.

3. The voting patterns of Abbott and Fauteux JJ. may be characterized as pro-government in taxation appeals.

⁵¹ The scale contains 146 votes. If nine justices participated in each of the twenty-eight cases, the scale would contain 252 votes. Accordingly, 106 non-participations result from the court's practice of sitting in panels. An additional eighty-four non-responses result from the inclusion on the scale of a column for each of the twelve justices who were on the court at any time during the eight years investigated.

⁵² Mr. Justice Ritchie's break-point would have been lower and his scale score higher if the normal rule requiring cases within the same voting division group to be ordered according to date were followed. See *supra*, footnote 29.

(a) This classification is given for Abbott J. both by his scale score of $-.43$ and by his voting division of four votes in favour of taxpayers and fourteen votes in favour of government (.22 affirmative).

(b) Mr. Justice Fauteux's voting pattern is classified as pro-government on the basis of his voting division of two affirmative and six negative votes (.25 affirmative), although his scale score of $-.75$ suggests classification as highly pro-government.

Note that the voting division of Mr. Justice Abbott is as pro-government (.22 affirmative) as that of Mr. Justice Cartwright is pro-taxpayer (.78 affirmative).

4. Finally, the T scale indicates that Mr. Justice Judson's voting pattern is highly pro-government, on the basis both of his scale score of $-.75$ and his voting division of nineteen negative votes in twenty-two participations (.14 affirmative). Mr. Justice Judson's voting pattern is especially noteworthy, as he participated in more cases on the T scale than any other justice (twenty-two out of twenty-eight) and has the most extreme voting pattern.

The T scale describes Chief Justice Kerwin's voting pattern as pro-government on the basis of both his voting division (.30 affirmative) and scale score ($-.57$), and Mr. Justice Locke's as pro-taxpayer on the basis of his voting division (.60 affirmative) and neutral on the basis of his scale score ($-.036$). However, no conclusions should be drawn about these justices until scales containing all divided taxation appeals in which they participated during their full terms on the court have been prepared and analysed.

The T scale, of course, gives no information about Mr. Justice Rand's voting pattern in taxation appeals.

Two subscales of the T scale have been prepared to facilitate the description of the justices' voting patterns—the Income Tax subscale (I), and the Excise Tax subscale (E), containing respectively the fourteen income tax appeals and the six excise tax appeals appearing on the T scale.⁵³ The ranking of the justices on the I subscale is identical with that on the T scale, with the exception of Fauteux J. who precedes Kerwin C.J. on the subscale solely

⁵³ The I subscale has an R of .92 and an S of .67. The difference between the observed consistency and the least possible consistency (computed for justices) given the structure of the subscale is .17. (MMR for justices is .75; MMR for cases is .70.)

The E subscale (composed of only six cases) has no inconsistent votes. Accordingly, R and S are each 1.00. MMR for justices is .87; MMR for cases is .77.

because he did not participate in case number 58-597. The six negative votes which appear inconsistent on the T scale remain inconsistent on the I subscale.

On the E subscale, Fauteux J. ranks fourth by reason of his affirmative vote in 61-361 which appears as an inconsistency on the T scale. The justices in the fifth to tenth positions on the E subscale cast no affirmative votes, and their ranking is based on their non-participations which determine the positions of their break-points. Rand and Hall JJ. cast no votes in appeals appearing on the E subscale.

Mr. Justice Cartwright, who appears at the extreme left side of the T scale, and exhibits the only voting pattern identified as pro-taxpayer, cast affirmative votes in eight of the ten income tax appeals in which he participated,⁵⁴ and in the three excise tax appeals,⁵⁵ one death duty appeal⁵⁶ and two of the three⁵⁷ appeals arising under municipal taxing by-laws in which he participated. He cast six affirmative votes in cases appearing on the lower half of the T scale, in which he was in dissent, and in five of those cases he dissented alone. His voting pattern suggests the hypothesis that he may be inclined as a matter of policy to favour the taxpayer in taxation appeals, at least where it is open upon the law for him to do so. I propose to attempt to determine whether the three inconsistent negative votes which he cast in cases on the T scale may be explained consistently with that hypothesis.

In *The Queen v. Alaska Pine & Cellulose Ltd.*⁵⁸ (60-686), Cartwright J., dissenting in part and voting negatively and inconsistently, held that section 5 of the British Columbia Social Services Tax Act⁵⁹ which exempts from sales tax material used as a "direct agent for the . . . manufacture of a product by contact" exempts material which comes in contact with the final product of

⁵⁴ See the I subscale. *North Bay Mica Co. Ltd. v. M.N.R.* (58-597); *Evans v. M.N.R.* (60-391); *M.N.R. v. Imperial Oil Ltd.* (60-735); *Regal Heights Ltd. v. M.N.R.* (60-902); *Orlando v. M.N.R.* (62-261); *Oxford Motors Ltd. v. M.N.R.* (59-548); *Can. Gen. Elec. v. M.N.R.* (62-3); *Falconer v. M.N.R.* (62-664), cited, *supra*, footnote 41.

⁵⁵ See the E subscale. *The Queen v. Premier Mouton Products Inc.* (61-361); *Deputy M.N.R. v. Consolidated Denison Mines Ltd. et al* (66-8); *Rexair of Canada Ltd. v. The Queen* (58-577), cited, *supra*, footnote 42.

⁵⁶ *Toronto General Trusts Corporation v. M.N.R.* (58-499), *supra*, footnote 43.

⁵⁷ *Seneca and Cayuga Separate School Board of Trustees v. Seneca* (64-569) and *Worldwide Evangelization Crusade v. Beamsville* (60-49). He voted negatively in *Ottawa v. Royal Trust Co.* (64-526), cited, *supra*, footnote 46.

⁵⁸ *Supra*, footnote 45, at p. 694.

⁵⁹ *Ibid.*

the manufacturing process, but not material which comes in contact only with waste products. He suggested that if the legislature had intended to exempt the latter material "some such word as 'substance' would have been more appropriate than the word 'product' ". Kerwin C.J.,⁶⁰ rejecting so narrow an interpretation of the word "product", held the exemption to be applicable.

Mr. Justice Cartwright's second inconsistent negative vote was cast in *Irrigation Industries Ltd. v. M.N.R.* (62-346),⁶¹ in which he was joined by Judson J. in dissent. The appellant company purchased certain speculative shares which the directors intended to sell at a profit as quickly as possible, and which the company did, in fact, sell at a profit within a few weeks. Cartwright J., noting that he was not bound by authority to hold such a profit taxable in the hands of a party not engaged in the business of trading in securities, held, however, that the transaction was an adventure in the nature of trade⁶² and that the profit was subject to income tax. The effect of his conclusion is to make the determination whether such a profit is income or capital, depend on the taxpayer's intention at the time the purchase is made. That some other justices believed that it was not necessary as a matter of law to adopt this test, is indicated by Mr. Justice Martland's adoption of a broader test⁶³ on the basis of which he held⁶⁴ that the profit was a capital gain and not taxable.

Mr. Justice Cartwright cast his third inconsistent negative vote in *Highway Sawmills Ltd. v. M.N.R.* (66-384).⁶⁵ Speaking for the

⁶⁰ *Ibid.*, at p. 690, Abbott, Martland and Judson JJ. concurring.

⁶¹ *Supra*, footnote 41.

⁶² Income Tax Act, *supra*, footnote 41, s. 2a and s. 139(1)e.

⁶³ "... whether the person dealt with the property in the same way as a dealer would ordinarily do, and whether the nature and quantity of the property excludes the possibility that its sale was the realization of a capital asset." See *M.N.R. v. Taylor*, [1956] C.T.C. 189.

⁶⁴ *Supra*, footnote 41, at p. 350, Taschereau J., as he then was, and Locke J., concurring.

⁶⁵ *Ibid.* In placing this appeal (66-384) on the scale, it was necessary to choose whether to assign an inconsistent affirmative vote to Ritchie J., or an inconsistent negative vote to Cartwright J. See *supra*, footnote 25. The inconsistent vote was assigned to Cartwright J., partly because his voting pattern suggests that his negative votes are inconsistencies, and partly because Mr. Justice Ritchie's affirmative vote in *Highway Sawmills* seems to be consistent with his affirmative votes in *Montreal Trust v. M.N.R.* (62-570) and *M.N.R. v. Imperial Oil* (60-735), all being income tax appeals in which the taxpayers were engaged in the extractive industries.

In placing *M.N.R. v. Bickle* (66-479) on the scale, it was necessary to choose whether to assign an inconsistent affirmative vote to Spence J. or an inconsistent negative vote to Ritchie J. In the absence of strong evidence to suggest to whom the inconsistency should be assigned, the normal rule of chronological order was followed, and the inconsistency was assigned to Spence J. This had the added advantage of producing higher break-points

majority,⁶⁶ he held that to compute the capital cost allowance to which a logging company is entitled,⁶⁷ it is necessary to deduct from the cost of the lumber cut, the amount of the proceeds received from the sale of stripped land, despite the fact that, when the company acquired the land and standing timber, the price was attributable wholly to the timber and not to the land, and that the company did not expect to sell the stripped land at a profit. On the question of statutory construction, Cartwright J. held⁶⁸ that as the meaning of the words of the statute and regulations was difficult to ascertain, the court should adopt the construction which conforms to the apparent scheme of the legislation. Accordingly, it appears that Mr. Justice Cartwright's decision against the taxpayer resulted from the application of a broad purposive rule of construction to an ambiguous taxing statute. A decision in favour of the taxpayer might have been reached by adopting a narrow rule of construction. That, in effect, was the course adopted by Ritchie J., who, dissenting, stated that the company's profit was a windfall which "fall[s] clear of . . . the 'rather intricate statutory skein' " of the relevant provisions of the Income Tax Act.⁶⁹

Thus, Mr. Justice Cartwright's three inconsistent votes occur in two cases (*Alaska Pine*, 60-686 and *Highway Sawmills*, 66-384), in which he chose a construction of an ambiguous statute more favourable to the government than to the taxpayer, and a third case (*Irrigation Industries*, 62-346) in which, to distinguish income from capital receipts, he applied a test favourable to the government. In the *Alaska Pine* case and the *Irrigation Industries* case, the majority of judges chose the construction or rule favourable to the taxpayer, although they appear to Mr. Justice Cartwright's right on the scale and hence generally are less likely to favour taxpayers' claims. In *Highway Sawmills*, Ritchie J. chose the construction favourable to the taxpayer.

Is it possible to reconcile Mr. Justice Cartwright's inconsistent negative votes with the hypothesis suggested by his voting pattern, that as a matter of policy he votes in favour of taxpayers, where it is open for him to do so under the applicable statutory and case law? The inconsistent votes clearly did not promote that policy.

for Ritchie and Spence JJ., a result which seems to be consistent with their voting divisions.

⁶⁶ Abbott, Judson and Spence JJ., concurring.

⁶⁷ See Income Tax Act, *supra*, footnote 41, ss. 11(1)(a), (b), 20(1), 20(5)(a), (c), (e); Income Tax Regulations, ss. 1100(1)(e), 1100(2) 1101(3)(a), (b), 1102(2) and Schedule 3.

⁶⁸ *Supra*, footnote 41, at pp. 393-394.

⁶⁹ *Ibid.*, at p. 399.

On the other hand, it is difficult to say that they were determined by the requirements of the applicable law, in an objective sense, as other justices voted affirmatively.

The explanation may be simply that a justice's view of what the law permits is a highly individual, even personal matter; so that a justice whose decisions generally are based on a certain policy may, in an individual case, believe that the applicable law prevents him from giving effect to that policy, even although other judges, not generally motivated by the policy, believe that the state of the law does not prevent a decision carrying out that policy. Mr. Justice Cartwright's negative inconsistent votes are some evidence that judicial decision-making is determined not only by law and policy, but by the ways in which individual judges in individual cases perceive law and policy.

Chief Justice Taschereau, as may be seen from the I and E subscales, voted affirmatively in three⁷⁰ of the six income tax appeals and two⁷¹ of the three excise tax appeals which he heard. Three of his negative votes in income and excise tax appeals occur in appeals in which the taxpayers were engaged in an extractive industry. In *Montreal Trust Co. v. M.N.R.* (62-570),⁷² he joined Judson J., in dissent, to hold that a well-drilling company which sold part of a mining lease obtained by it in consideration for its promise to drill an oil well, received the proceeds from the sale as income not capital. In *M.N.R. v. Imperial Oil Ltd.* (60-735)⁷³ he concurred with the majority judgment given by Judson J., construing against the interests of the taxpayer a regulation governing the method of calculating the depletion allowance on oil wells.⁷⁴ In *Deputy M.N.R. v. Consolidated Denison Mines* (66-8),⁷⁵ an excise tax appeal, he concurred with Spence J. that certain "rock bolts" used in the construction of mine shafts were structural devices, not safety devices, and accordingly were not exempt from sales tax.⁷⁶

⁷⁰ *Evans v. M.N.R.* (60-391); *Irrigation Industries Ltd. v. M.N.R.* (62-346) and *Curran v. M.N.R.* (59-850), *supra*, footnote 41.

⁷¹ *The Queen v. Premier Mouton Products Inc.* (61-361) and *The Queen v. Beaver Lamb and Shearling Co. Ltd.* (60-505), discussed *infra*, text at footnotes 91 and 94.

⁷² *Supra*, footnote 41.

⁷³ *Ibid.*

⁷⁴ Regulation 1201 passed under the Income Tax Act. The majority held that to compute the profits to establish the base on which the depletion allowance is calculated, it is necessary to deduct from the profits attributable to profitable wells, all losses and costs which the company deducts in determining its taxable income. The minority held that it is necessary to deduct only the expenses related to profitable wells.

⁷⁵ *Supra*, footnote 42.

⁷⁶ Under The Excise Tax Act, *supra*, footnote 42, ss. 30, 32 and Schedule

Mr. Justice Martland's voting behaviour in appeals involving the liability of taxpayers engaged in the extractive industries⁷⁷ contrasts with that of Taschereau C.J. Martland J. voted in favour of taxpayers engaged in the extractive industries in three income tax appeals and in the provincial sales tax appeal in which such taxpayers were parties. Thus, he voted affirmatively with the majority in the *Montreal Trust Co.* case (62-570) in which Taschereau J., as he then was, voted negatively in dissent; and he voted affirmatively in dissent in the *Imperial Oil* case (60-735), in which Taschereau J., as he then was, voted negatively with the majority. Again, he voted affirmatively in *North Bay Mica Co. v. M.N.R.* (58-597),⁷⁸ holding that a mica mine abandoned in 1947 and reactivated by new owners in 1950 "came into production" on the latter date, and so qualified for an exemption;⁷⁹ and in *The Queen v. Alaska Pine and Cellulose Ltd.* (60-686).⁸⁰

Mr. Justice Martland voted negatively in the three excise tax cases in which he participated, holding that the dietary aids "Metrecal" (66-457)⁸¹ and "Limmits" (66-459)⁸² are pharmaceutical, rather than foodstuff, and hence subject to sales tax. In *Rexair of Canada v. The Queen* (58-577),⁸³ he agreed with the majority that where articles of trade were manufactured by one company for another to which they were sold, the second company reselling to its distributors, the sales tax was payable on the higher price which obtained in the second sale.

Mr. Justice Abbott, whose voting pattern in taxation cases has been classified as pro-government, voted negatively in the five excise tax appeals⁸⁴ and in seven of the eight income tax appeals⁸⁵

3. Abbott and Ritchie JJ. also concurred with Spence J. Cartwright J. dissented.

⁷⁷ Martland J. voted affirmatively in *Premium Iron Ores Ltd. v. M.N.R.* (66-685), *supra*, footnote 41. However, the issue in that case (the deductibility of legal expenses incurred in resisting a foreign income tax claim) was not related to the extractive industries as such. He also voted affirmatively in *Falconer v. M.N.R.* (62-664), *supra*, footnote 41.

⁷⁸ *Supra*, footnote 41. Martland J. concurred with Cartwright J.

⁷⁹ Under s. 85(5) of the Income Tax Act, *supra*, footnote 41, Kerwin C.J., speaking for himself and Judson J. in dissent, held, *ibid*, at p. 601, that the mine was the same physical thing as that operated by the previous owner and "came into production" prior to 1946, and did not qualify for the exemption.

⁸⁰ *Supra*, footnote 45; discussed, *supra*, text at footnote 58.

⁸¹ *The Queen v. Mead Johnson of Canada Ltd.*, *supra*, footnote 42.

⁸² *Pfizer Corporation v. The Queen*, *ibid*.

⁸³ *Rexair of Canada Ltd. v. The Queen*, *ibid*.

⁸⁴ See the E subscale. *The Queen v. Premier Mouton Products, Inc.*; *Pfizer Corporation v. The Queen*; *The Queen v. Mead Johnson of Canada Ltd.*; *Deputy Minister of National Revenue v. Consolidated Denison Mines Ltd.*, and *Rexair of Canada Ltd. v. The Queen*, *ibid*.

⁸⁵ See the I subscale. *Premium Iron Ores Ltd. v. M.N.R.*; *M.N.R. v.*

in which he participated. His four affirmative votes occur in the only appeal on the T scale arising under a provincial taxing statute (60-686),⁸⁶ in one of the two appeals in which he was called upon to consider municipal taxing by-laws (64-569),⁸⁷ in one of the two death duty appeals which he heard (60-477)⁸⁸ and in one income tax appeal (58-597).⁸⁹ Prior to his appointment to the court in 1954, Mr. Justice Abbott served as Minister of Finance in the federal government for seven years.

Mr. Justice Fauteux, immediately to the right of Abbott J. on the T scale and with a pro-government voting pattern, voted negatively in six of his eight participations.⁹⁰ His inconsistent affirmative vote on the T scale (which appears as a consistent vote on the E subscale) occurred in *The Queen v. Premier Mouton Products Inc.* (61-361).⁹¹ In that case, the taxpayer brought a petition of right to recover excise tax paid by it several years earlier under protest, in the face of threats by officers of the Department of National Revenue to have the company's licence cancelled. Mr. Justice Fauteux⁹² held that the moneys were paid under duress, and, therefore, that the company's claim was not barred by the limitation period applicable to claims for a refund of moneys paid under mistake of law or fact.⁹³

Mr. Justice Fauteux clearly viewed the case as one raising, as a primary issue, the question of the proper limits to be placed on the use of threats by civil servants. His inconsistent affirmative vote may perhaps be explained on that basis. Whether Mr. Justice

Sedgwick; Highway Sawmills Ltd. v. M.N.R.; Orlando v. M.N.R.; Oxford Motors Ltd. v. M.N.R.; Can. Gen. Elec. v. M.N.R., and Falconer v. M.N.R., cited, *supra*, footnote 41.

⁸⁶ *The Queen v. Alaska Pine and Cellulose Ltd.*, *supra*, footnote 45, discussed *supra*, text at footnote 58.

⁸⁷ *Seneca and Cayuga Separate School Board of Trustees v. Seneca*, *supra*, footnote 46. Abbott J. concurred with Cartwright J., who, speaking for the majority, held that lands and buildings owned by the school board but no longer used as a school, were exempt from taxation. The Assessment Act, R.S.O., 1960, c. 23, ss. 4 and 9. Judson J. dissented.

⁸⁸ *M.N.R. v. Smith*, *supra*, footnote 43 (construction of the Dominion Succession Duty Act, R.S.C., 1952, c. 89, ss. 3(1)(c) and (4)).

⁸⁹ *North Bay Mica Co. Ltd. v. M.N.R.*, *supra*, footnote 41; discussed, *supra*, text at footnote 78.

⁹⁰ Three income tax appeals: *Evans v. M.N.R.; Regal Heights Ltd. v. M.N.R.*, and *Oxford Motors Ltd. v. M.N.R.*, cited, *supra*, footnote 41; one excise tax appeal, *The Queen v. Beaver Lamb and Shearling Co. Ltd.*, cited, *supra*, footnote 42; one death duty appeal, *M.N.R. v. Smith*, *supra*, footnote 43; and one appeal arising under a municipal taxing by-law, *Ottawa v. Royal Trust Co.*, *supra*, footnote 46.

⁹¹ *Supra*, footnote 42.

⁹² Cartwright J., concurred, and Taschereau J., as he then was, agreed in separate reasons. Abbott J. (Kerwin C.J. concurring), dissented, holding that the limitation period was applicable.

⁹³ Excise Tax Act, *supra*, footnote 42, s. 46(6).

Fauteux's vote in the appeal is in accord with his voting pattern in other cases raising that issue is beyond the scope of this article.⁶⁴

Mr. Justice Judson, the only justice with a strongly pro-government voting pattern, voted negatively in nineteen of the twenty-two appeals in which he participated, including eight appeals in the top half of the T scale in which he was in dissent. His only affirmative votes appear in a death duty appeal (58-499),⁶⁵ an appeal arising under the federal Customs Act (58-652)⁶⁶ and *The Queen v. Alaska Pine*, the only appeal on the scale arising under a provincial statute (60-686).⁶⁷

B) *The Negligence Scale*

The Negligence Scale (N)⁶⁸ contains twenty-seven divided decisions in negligence appeals heard by the Supreme Court of Canada after January 15th, 1958, and reported in the 1958 to

⁶⁴ In *The Queen v. Beaver Lamb and Shearling Co.* (60-505), *ibid.*, an earlier case raising the same issue, Fauteux J. agreed with Kerwin C.J. that the taxes were paid under a mistake of law rather than under duress, and therefore that the claim was barred by s. 46(6). Chief Justice Taschereau upheld the taxpayer's claim in both appeals.

⁶⁵ *Toronto General Trusts Corporation v. M.N.R.*, *supra*, footnote 43, Judson J. held that where a beneficiary under a will predeceases the testator, but the gift is prevented from lapsing by s. 36(1) of the Wills Act, R.S.O., 1950, c. 426 (which provides that the gift shall take effect as if the beneficiary died immediately after the testator) and passes under the beneficiary's will to his beneficiary, there is only one succession within the meaning of the Succession Duty Act, *supra*, footnote 88, ss. 2(m) and 3(1)i, and only one duty is payable. Martland J. dissented, casting his single inconsistent vote on the T scale.

⁶⁶ *Dominion Engineering Works Ltd. v. Deputy M.N.R.*, *supra*, footnote 44.

⁶⁷ *The Queen v. Alaska Pine and Cellulose Ltd.*, *supra*, footnote 45, discussed, *supra*, text at footnote 58.

⁶⁸ I have omitted from the N scale four appeals involving claims in tort against police officers. These appeals are perhaps related both to the N scale and to the C scale, *infra*. They have been gathered together in a separate scale, which is shown below. In *Lamb v. Benoit*, [1959] S.C.R. 321, the plaintiff was awarded damages against a police officer for false imprisonment and malicious prosecution. In *Beim v. Goyer*, [1965] S.C.R. 638, the plaintiff obtained damages for injuries negligently inflicted by a police officer during pursuit. In *Priestman v. Colangelo, Shynall and Smythson*, [1959] S.C.R. 615, the administrators of the estates of two bystanders who were killed during a pursuit by police officers of a third party, did not succeed in their action for damages. In *Kirkpatrick v. Lament*, [1965] S.C.R. 538, the plaintiff, who alleged that the defendant police officer used excessive force to effect an arrest, did not succeed in his action for damages.

	C	A	R	H	S	Ra	K	T	L	M	J	F
59-321 Lamb	+	—				+	+	—	+	+	+	— 6-3
65-638 Beim	+	+	+	+	+			+		—	—	— 6-3
59-615 Priestman	+	+						—	—			— 2-3
65-538 Kirkpatrick	+				—					—	—	— 1-4

+ = pro-plaintiff

— = pro-defendant police officer.

1966 volumes of the *Supreme Court Reports*. Included on this scale are fourteen motor vehicle appeals,⁹⁹ four appeals involving the liability of occupiers to persons (invitees) on their premises,¹⁰⁰

The voting pattern described in these cases is perhaps not highly significant, considering the small number of cases and the large number of non-participations. However, the voting patterns described for Cartwright, Judson and Fauteux JJ. appear to resemble their voting patterns on the C scale more closely than their voting patterns on the N scale.

I have also omitted from the N scale *Cauchon v. La Commission des Accidents du Travail de Québec*, [1964] S.C.R. 395; The Workmen's Compensation Commission paid compensation to R, an employee of L, a heating contractor, for injuries caused to R, while working on C's premises, by the explosion of a heater which C had engaged L to repair. Abbott J. (Taschereau C.J. and Fauteux and Spence JJ. concurring), upheld the judgment obtained by the Commission against C for the amount of the compensation paid to R, and dismissed C's appeal in his action against L for indemnity, on the ground that the court ought not to interfere with the concurrent findings of fact of the trial judge and the majority of the Court of Appeal, that as between C and L the explosion was caused by C's negligence. Cartwright J., dissenting, held, at p. 400, that, as between C and L, the explosion was caused by L's negligence. He would have dismissed both the Commission's action against C and C's action against L, as to allow both actions would require L to pay the damages suffered by his employee, and that result is contrary to the Workmen's Compensation Act, R.S.Q., 1964, c. 159.

The appeal is omitted from the N scale as the majority and minority votes cannot be polarized as required by the scale classification. The majority votes may be classified only as negative, as they deny recovery by C against L. On the other hand, Mr. Justice Cartwright's vote may not be classified as affirmative as its effect is to dismiss the actions against C and L.

Mr. Justice Abbott's reasons indicate that the majority based its votes on its view that the court should exercise restraint in dealing with fact-finding by lower courts. It might well be rewarding to develop scales of cases in which such judicial restraint is a major issue, as the Reports contain numerous references to it. See, for example, the following cases on the N scale: *Fleming v. Atkinson*, [1959] S.C.R. 513; *Ratté v. Provencher*, [1964] S.C.R. 606; *Gilchrist v. A. & R. Farms Ltd.*, [1966] S.C.R. 122; *Radcliffe v. Rennie and McBeath*, [1965] S.C.R. 703, and *Kauffman v. Toronto Transit Commission*, [1960] S.C.R. 251. Cartwright J., dissenting, while he departed from the facts as found by the lower courts, treated the case as turning on the effect to be given to the Workmen's Compensation Act. His vote may be interpreted as one protecting the individual C, from liability at the suit of a government agency, and seems to conform to his voting pattern on the T and C scales, involving disputes between the individual and the state.

⁹⁹ *Lehnert v. Stein*, [1963] S.C.R. 38; *Dormuth et al v. Untereiner et al*, [1964] S.C.R. 122; *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd. et al*, [1966] S.C.R. 13; *Gagnon v. Derooy*, [1958] S.C.R. 708; *Roumieu v. Osborne*, [1965] S.C.R. 145; *Corrie v. Gilbert*, [1965] S.C.R. 457; *Ratté v. Provencher*, [1964] S.C.R. 606; *Stirling Trusts Corp. v. Postma et al*, [1965] S.C.R. 324; *Co-operators Insurance Association v. Kearney*, [1965] S.C.R. 106; *Hunt and Mayo v. MacLeod Construction Co. Ltd. et al*, [1958] S.C.R. 737; *Driver et al. v. Coca-Cola Ltd.*, [1961] S.C.R. 201; *Robitaille v. Procureur Général de Québec*, [1963] S.C.R. 186; *Hossack et al v. Hertz Drive Yourself Stations of Ontario Ltd. et al*, [1966] S.C.R. 28; *O'Brien v. Mailhot*, [1966] S.C.R. 171.

¹⁰⁰ *Carriss v. Buxton*, [1958] S.C.R. 441; *McCormack v. T. Eaton Co. Ltd.*, [1963] S.C.R. 180; *Campbell v. Royal Bank of Canada*, [1964] S.C.R. 85; *Kauffman v. Toronto Transit Commission*, [1960] S.C.R. 251.

and two decisions concerning damage caused by ships.¹⁰¹ The six remaining appeals involve the liability of a farmer for animals wandering unattended on the highway,¹⁰² manufacturer's liability,¹⁰³ an employer's liability to his employee,¹⁰⁴ medical negligence,¹⁰⁵ the liability of a "gardien juridique" under article 1054 of the Quebec Civil Code,¹⁰⁶ the liability of a municipal corporation for property damage caused by a drainage ditch¹⁰⁷ and the liability of a summer camp to a camper.^{107A}

The scale is constructed so as to examine the effect of the justices' votes on claims by plaintiffs to recover compensation for injuries they have suffered. A vote favouring a plaintiff's claim is classified as affirmative, and a vote denying or restricting his claim is classified as negative. Thus, an affirmative vote often promotes the wide distribution of the risks inherent in an industrialized mechanized society (as in motor vehicle negligence cases), and is often a vote against an insurance company (as in motor vehicle cases, occupiers' liability and medical negligence cases), or against a business or governmental organization (as in some occupier's liability and manufacturer's liability cases), and in favour of the private citizen. Of course, an affirmative vote is not a vote in favour of an individual as opposed to a large organization, where, for example, both plaintiff and defendant are organizations of approximately equal size.¹⁰⁸

The R and S coefficients are .87¹⁰⁹ and .61. The former is below the minimum accepted as evidencing unidimensionality on Guttman scales. Therefore, it cannot be said, on the basis of Guttman theory, that the decisions are based on the judges' attitudes toward recovery of damages by plaintiffs. However, it should be noted that the difference between the observed consistency and the least possible consistency given the structure of the scale (computed for justices),¹¹⁰ is .17. Therefore, the improvement in consistency is not inconsiderable.

¹⁰¹ *Marwell Equipment Ltd. et al v. Vancouver Tug Boat Co. Ltd.*, [1961] S.C.R. 43; *Garland Steamship Co. v. The Queen*, [1960] S.C.R. 315.

¹⁰² *Fleming v. Atkinson*, [1959] S.C.R. 513.

¹⁰³ *Hobbs Manufacturing v. Shields*, [1962] S.C.R. 716.

¹⁰⁴ *Gilchrist v. A. & R. Farms Ltd.*, [1966] S.C.R. 122.

¹⁰⁵ *Radclyffe v. Rennie and McBeath*, [1965] S.C.R. 703.

¹⁰⁶ *M. & W. Cloaks Ltd. v. Cooperberg and Davis*, [1959] S.C.R. 785.

¹⁰⁷ *District of North Vancouver v. McKenzie Barge and Marine Ways Ltd.*, [1965] S.C.R. 377.

^{107A} *Grieco and Zicardi v. L'Externat Classique Ste. Croix*, [1962] S.C.R. 519.

¹⁰⁸ See, e.g., *M. & W. Cloaks Ltd. v. Cooperberg & Davis*, *supra*, footnote 106.

¹⁰⁹ I have included in the computation of R, decisions in which the court divided 4-1 and 1-4. But see, *supra*, footnote 9.

¹¹⁰ MMR for justices is .70; MMR for cases is .69.

NEGLIGENCE SCALE (N)

Voting division
Scale score

Cariss 58-441
Grieco 62-519
Lehnert 63-38
McCormack 63-180
Dormuth 64-122
Gorman 66-13
Fleming 59-513
Gagnon 58-708
Marwell Equip. 61-43
Roumieu 65-145
Corrie 65-457
Hobbs Mfg. 62-716
Campbell 64-85
Ratté 64-606
Stirling Trust 65-324
Co-op. Insurance 65-106
Gilchrist 66-122
Radclyffe 65-703
M. & W. Cloaks 59-785
Hunt & Mayo 58-737
Gartland SS. Co. 60-315
Kauffman 60-251
Driver 61-201
Robitaille 63-186
McKenzie Barge 65-377
Hossack 66-28
O'Brien 66-171

27 appeals

1.00 .78 .68 1.00 .67 .43 .50 .53 .35 .23 .56 .29
1.00 .93 .81 .74 .44 .33 .11 -.11 -.19 -.41 -.48 -1.00

H S C Ra T J K M R A F L

			+	+						+	+	—	4-1
				+			+			+	+	—	4-1
		+				(—)	+	+					4-1
	+		+		(—)			+	+		+		4-1
		+	(—)		(—)			+	+				4-1
		(—)	+	(—)	+				+	+		(+)	5-2
		(—)			+						—	—	3-2
					(—)		+	+	+	—	—	—	3-2
	+				(—)		+	+	+	—			3-2
		(—)				+	+	+	—				3-2
	+	+	+		+	+	—	—			—		3-2
		+	(—)		+	+	—	—					3-2
			+		+	+		—	—				2-3
		(—)	+	+	—	—	—	—	—		(+)		2-3
			+	—	—	—		(+)	—			(+)	2-3
		+	+		—	—	—	—	—			—	1-4
		+	+		—	—	—	—	—			—	1-4
		+	+		—	—	—	—	—			—	1-4
	+	+	—			—	—	—	—			—	1-4
													1-4
+	6	7	13	3	8	9	3	8	6	3	5	2	
—	0	2	6	0	4	12	3	7	11	10	4	5	
	6	9	19	3	12	21	6	15	17	13	9	7	

R = .87

S = .61

R—MMR (computed for justices) = .17

+ = pro-plaintiff

— = pro-defendant

() inconsistent votes are shown in brackets

137 participations

1967]

The Supreme Court of Canada, 1958-1966

699

MOTOR VEHICLE SUBSCALE (MV)

Voting division
Scale score

1.00	.83	.80	1.00	.57	1.00	.63	.45	0.00	0.00	.30	0.00
1.00	.86	.71	.71	.36	.29	.072	-.072	-.72	-.78	-.86	-1.00

		H	S	C	Ra	T	L	M	R	A	F	J	K	
Lehnert	63-38			+				+	+			+	—	4-1
Dormuth	64-122	+				+		+	+			+		4-1
Gorman	66-13		+	+				+	+			—		4-1
Gagnon	58-708			+		(—)	+		+			(+)		3-2
Roumieu	65-145					+		+	+			—		3-2
Corrie	65-457	+						+	+			—		3-2
Ratté	64-606		+	+		+			—			—		3-2
Stirling Trust	65-324	+	+	+				—	—			—		3-2
Co-op. Insur.	65-106		+	(—)		+		—	—			(+)		3-2
Hunt & Mayo	58-737			+	+			—				—		2-3
Driver	61-201			+		—			—			—		1-4
Robitaille	63-186			+		—		—	—			—		1-4
Hossack	66-28		+	—				—	—			—		1-4
O'Brien	66-171	+	—					—	—			—		1-4
14 appeals		+	4	5	8	1	4	1	5	5	0	0	3	0
		—	0	1	2	0	3	0	3	6	7	4	7	1
			4	6	10	1	7	1	8	11	7	4	10	1

R = .94

S = .76

R—MMR (computed for justices) = .10

+ = pro-plaintiff

— = pro-defendant

() inconsistent votes are shown in brackets

70 participations

NON-MOTOR VEHICLE SUBSCALE

Voting division

Scale score

.66	1.00	1.00	.80	.55	1.00	.60	.43	.50	.17	.56	.17
1.00	.77	.62	.54	.38	.31	.15	-.077	-.077	-.23	-.54	-1.00

		S	F	H	T	J	Ra	K	M	A	R	C	L	
Cariss	58-441		+				+			+		+	—	4-1
Grieco	62-519		+		+			+		+		—	—	4-1
McCormack	63-180		+		+	(-)		+				+	—	4-1
Fleming	59-513		+		+	+	+			+		—	—	5-2
Marwell Equip.	61-43					+			+		+	—	—	3-2
Hobbs Mfg.	62-716					+		+	+		—	—	—	3-2
Campbell	64-85	+		+		+		—	—	—	—	—	—	3-2
Gilchrist	66-122			+		+		—	—	—	—	(+)	—	3-2
Radclyffe	65-703	(-)				+		—	—	—	—	(+)	—	2-3
M. & W. Cloaks	59-785		+		+	—		—		—		—	—	2-3
Gartland SS. Co.	60-315				—	—			(+)			—	(+)	2-3
Kauffman	60-251				—	—		—	—			(+)	—	1-4
McKenzie Barge	65-377	+			—	—		—	—	—	—		—	1-4
13 appeals		+	2	5	2	4	6	2	3	3	3	1	5	1
		—	1	0	0	1	5	0	2	4	3	5	4	5
		3	5	2	5	11	2	5	7	6	6	9	6	

R = .90

S = .67

R—MMR (computed for justices) = .16

+ = pro-plaintiff

— = pro-defendant

() inconsistent votes are shown in brackets

67 participations

In spite of the high incidence of nonparticipation¹¹¹ resulting from the court's practice of sitting in panels, the N scale identifies, in broad outline, four fairly clearly defined types of voting behaviour.

1. Mr. Justice Hall's voting pattern may be classified as strongly pro-plaintiff on the basis both of his scale score of 1.00 and his voting division of 1.00 affirmative, indicating that the effect of his votes in the six cases in which he participated was to support the plaintiff's claim.

2. The voting patterns described for Spence and Cartwright JJ., and Taschereau C.J. may be classified as pro-plaintiff.

(a) Mr. Justices Spence and Cartwright have voting patterns which may be classified as highly pro-plaintiff on the basis of their scale scores of .93 and .81 but only as pro-plaintiff on the basis of their voting divisions. Spence J., whose votes supported the plaintiff in seven of his nine participations, has a voting division measure of .78 affirmative (just short of the minimum of .80 which is defined as highly pro-plaintiff). Cartwright J. voted in favour of plaintiffs' claims in thirteen of nineteen participations and his voting division measure is .68 affirmative.

(b) Chief Justice Taschereau's voting pattern is classified as pro-plaintiff on the basis of both his scale score of .44 and his voting division of .67 affirmative. The effect of his votes was to uphold plaintiff's claim in eight of the twelve appeals he heard.

3. The scale describes neutral voting patterns for Judson, Martland, Fauteux and Ritchie JJ.

(a) Mr. Justice Judson's voting pattern may be classified as pro-plaintiff on the basis of his scale score of .33 which reflects his break-point after the eighteenth case on the scale. As a result of his low break-point, he appears in the sixth position on the scale immediately to the right of Taschereau C.J. However, he casts twelve of his twenty-one votes in favour of defendants (six inconsistently) and his voting division measure of .43 affirmative suggests a classification of neutral, with a pro-defendant tendency. I argue, *infra*, that a classification of neutral with a pro-plaintiff tendency is more accurate.

¹¹¹ The scale contains 137 votes. If nine justices participated in each of the twenty-seven cases, the scale would contain 243 votes. Thus, 106 non-participations result from the court's practice of sitting in panels. An additional eighty-one non-responses result from inclusion on the scale of a column for each of the twelve justices who held office during the eight years under review.

(b) Mr. Justice Martland's voting pattern may be classified as neutral both on the basis of his scale score of $-.11$ and his voting division (.53 affirmative) of eight affirmative and seven negative votes. His voting pattern is one in which support of and opposition to plaintiffs' claims in these actions is evenly balanced.

(c) Mr. Justice Fauteux's voting pattern is classified as neutral on the basis of his voting division of five affirmative and four negative votes (.56 affirmative), notwithstanding his high break-point, by reason of which he is located in the eleventh place on the N scale and has a scale score of $-.48$ which suggests a classification of pro-defendant. As the N scale covers only one-half of Mr. Justice Fauteux's term on the bench, and as he participated in only nine appeals on the scale, the classification of his voting pattern as neutral must be considered tentative, and final classification must await the preparation and analysis of scalograms covering his entire term on the court.

(d) Mr. Justice Ritchie's voting pattern is classified as neutral on the basis of his scale score of $-.19$, and as pro-defendant on the basis of his voting division of .35 affirmative (eleven votes in favour of defendants in seventeen participations). Adopting the less extreme measure, we classify his voting pattern as neutral.

4. Mr. Justice Abbott's voting pattern is classified as pro-defendant on the basis of his scale score of $-.41$. His voting division of ten pro-defendant votes in thirteen participations (.23 affirmative) also suggests classification as pro-defendant.

The N scale does not give a reliable indication of the voting patterns of Kerwin C. J. and Rand and Locke JJ. as it covers only a few years of the tenure of these justices.

The N scale is divided into two subscales.¹¹² The Motor Vehicle subscale (MV), contains the fourteen cases on the N scale which raise a question concerning the negligent operation of a motor vehicle. The second subscale contains the remaining thirteen cases

¹¹² The MV subscale produces an R coefficient of .94 and an S coefficient of .76. Therefore, the minimum degree of consistency required by Guttman theory is met. However, the difference between the observed consistency and the least possible consistency given the structure of the subscale (computed for justices) is .10, an improvement which cannot be considered to be significant. (MMR for justices is .84; MMR for cases is .70).

The subscale of cases other than motor vehicle cases produces an R coefficient of .90, and an S coefficient of .67. Therefore, the minimum degree of consistency required by Guttman theory is met. The difference between the observed consistency and the least possible consistency given the structure of the subscale, computed for justices, is .16, a relatively large improvement. (MMR for justices is .74; MMR for cases is .69).

on the N scale. The changes in rank order of Judson J. on the MV subscale and of Cartwright and Fauteux JJ. on the second subscale appear to be significant and are discussed *infra*. The changes in rank order of Kerwin C.J. and of Locke and Hall JJ. are caused largely by their limited number of participations and are not significant.

• Mr. Justice Hall holds the first position on the left side of the N scale by reason of the fact that all his votes, including that in the last case on the scale, supported the plaintiffs' claims. Although he participated in only six appeals (four motor vehicle negligence,¹¹⁷ one occupier's liability¹¹⁴ and one employer's liability),¹¹⁵ these are fairly well distributed along the scale. However, he participated in only one decision¹¹⁶ in the bottom third of the scale, which contains appeals decided against plaintiffs. If he had participated in a larger number of those cases and had voted affirmatively, the evidence supporting his location on the extreme left of the scale would be more complete. Yet, his voting record appears to justify our placing him in that position, at least until further data becomes available.

Spence J., immediately to the right of Hall J. on the N scale, with a pro-plaintiff voting pattern, participated in eleven appeals, and voted affirmatively in nine, including five motor vehicle appeals,¹¹⁷ one occupier's liability appeal¹¹⁸ and one appeal in an action brought against a municipality for damage caused to realty by the operation of a municipal drainage ditch.¹¹⁹ Of his two negative

¹¹³ *Dormuth v. Untereiner* (64-122); *Corrie v. Gilbert* (65-457); *Stirling Trusts Corp. v. Postma* (65-324) and *O'Brien v. Mailhot* (66-171), cited, *supra*, footnote 99.

¹¹⁴ *Campbell v. Royal Bank of Canada* (64-85), *supra*, footnote 100 (defendant bank held liable for injuries sustained when plaintiff customer slipped on melted snow allowed by the bank to collect on the bank floor, and constituting an "unusual danger"). Judson and Hall JJ. concurred with Spence J.; Martland and Ritchie JJ. dissented.

¹¹⁵ *Gilchrist v. A. & R. Farms Ltd.* (62-122), *supra*, footnote 98 (defendant employer held liable to employee for failure to provide a safe place to work). Judson and Hall JJ. concurred with Cartwright J. Martland and Ritchie JJ. dissented.

¹¹⁶ *O'Brien v. Mailhot* (66-171). Hall J., dissenting alone, held that a motorist was negligent in not keeping a proper look-out when, after stopping in a school zone, he proceeded on the signal of a traffic officer and injured the plaintiff's son. Spence J., casting his only consistent negative vote on the N scale, concurred with Abbott J., as did Fauteux and Ritchie JJ.

¹¹⁷ *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd.* (66-13); *Ratté v. Provencher* (66-606); *Stirling Trust Corp. v. Postma* (65-324); *Co-operators Insurance Associations v. Kearney* (65-106); and *Hossack v. Hertz Drive Yourself Stations of Ontario Ltd.* (66-28), *supra*, footnote 99.

¹¹⁸ *Campbell v. Royal Bank of Canada* (64-85), *supra*, footnotes 100 and 114.

¹¹⁹ *North Vancouver v. McKenzie Barge and Marine Ways Ltd.* (65-377).

votes, one cast in *O'Brien v. Mailhot* (66-171),¹²⁰ a motor vehicle case, appears as a consistent vote on the N scale; the second, cast in *Radclyffe v. Rennie and McBeath* (65-703),¹²¹ an action for medical malpractice, appears inconsistent. In the latter appeal, Spence J. refused to disturb the finding of the trial judge, that the plaintiff had failed to establish that the surgical gauze of which she complained had been left in her body during an operation performed by the first defendant doctor in 1959, rather than during an operation performed by the second defendant doctor in 1944. (The action with respect to the earlier operation was statute-barred.)¹²²

Cartwright J., located on the N scale immediately to the right of Spence J., participated in nineteen appeals. He voted to uphold plaintiff's claims for compensation in thirteen appeals, that is, in more than two-thirds of his participations, including five appeals in the bottom third of the scale, in which the majority of the court voted against recovery by the plaintiffs. His voting pattern was classified as pro-plaintiff.

Mr. Justice Cartwright's voting pattern on the subscale of motor vehicle appeals differs from his voting pattern on the subscale of other appeals. On the former subscale, he voted affirmatively in eight of the ten appeals in which he participated.¹²³ His only inconsistent negative vote¹²⁴ was cast in *Co-operators Insurance Association v. Kearney* (65-106).¹²⁵ In that case, the

Spence J., dissenting, held that the Municipal Act, R.S.B.C., 1960, c. 255, s. 529, which prohibits the bringing of an action against a municipality for damages arising out of the operation of a ditch authorized by s. 527, did not bar the action where, as here, 'the ditch constituted a nuisance or had been negligently constructed. Furthermore, he held that the construction of the ditch was not authorized by s. 527. Martland J. (Abbott, Judson and Ritchie JJ. concurring), held that the section was applicable and that the plaintiff could seek compensation only through arbitration as provided by s. 478(1).

¹²⁰ Discussed *supra*, footnote 116. ¹²¹ *Supra*, footnote 105.

¹²² Abbott and Ritchie JJ. concurred with Spence J. Cartwright J. (Judson J. concurring), dissented, holding that the plaintiff had established her claim against the doctor who operated in 1959.

¹²³ *Lehnert v. Stein* (63-38); *Gorman v. Hertz Drive Yourself Stations of Ontario Ltd.* (66-13); *Gagnon v. Derooy* (58-708); *Ratté v. Provencher* (64-606); *Stirling Trust Corp. v. Postma* (65-324); *Hunt and Mayo v. MacLeod Construction Co. Ltd.* (58-737); *Driver et al v. Coca-Cola Ltd.* (61-201); and *Robitaille v. Procureur Général de Québec* (63-186), *supra*, footnote 99.

¹²⁴ He voted negatively and consistently in *Hossack v. Hertz* (66-28), *supra*, footnote 99, to uphold the decision of the Ontario Court of Appeal reducing the amount of general damages from \$94,000.00 to \$65,000.00. Martland, Judson and Ritchie JJ. concurred, each giving separate reasons for judgment. Spence J., dissenting, would have awarded \$82,360.00 as general damages.

¹²⁵ See, *supra*, footnote 99.

¹²⁶ R.S.O., 1960, c. 172.

plaintiff brought action against his employer for damages for injuries he sustained while riding, during the course of his employment, in an automobile owned by his employer and driven by a fellow employee, whose negligence was found to be the cause of the plaintiff's injuries. The majority in the Supreme Court held that although section 105(2) of the Ontario Highway Traffic Act¹²⁶ bars the plaintiff's action as gratuitous passenger against the defendant as owner of the automobile, it does not bar his action as employee against the defendant as employer, for the latter's failure to take reasonable care to provide for the safety of his employee. Cartwright J., dissenting, refrained from limiting the effect of the section in this way. He stated¹²⁷ that as the words of the statute were "clear and unequivocal the court must give effect to them although they bring about what in the eyes of the common law appears to be a grave injustice".¹²⁸

On the subscale of non-motor vehicle appeals, Mr. Justice Cartwright's votes are more evenly balanced between support for and denial of plaintiffs' claims. He cast four negative votes, and therefore ranks eleventh on the right side of that subscale,¹²⁹ although he ranks third on both the N scale and the MV subscale. His five affirmative votes were cast in three occupier's liability appeals,¹³⁰ the employer's liability appeal¹³¹ and the medical mal-

¹²⁷ *Supra*, footnote 99, at p. 127.

¹²⁸ Cartwright J. found it impossible to overcome the conceptual difficulty which arises if the plaintiff is allowed to recover against the employer for the driver's negligence. He said, *ibid.*, at p. 131, "... the passenger's right of action is gone because the negligent act, liability for which is negated, is as much an essential part of the passenger's cause of action against his own employer and his cause of action against the employer of the driver as it is of his cause of action against the driver".

¹²⁹ On the subscale, the negative votes establish Mr. Justice Cartwright's break-point after the second case. Thus, his scale score of—.66 on that subscale classifies his voting division as highly pro-defendant. However, his voting division of five affirmative and four negative votes (.56 affirmative) suggests a classification as neutral with a slightly pro-plaintiff tendency.

¹³⁰ *Cariss v. Buxton* (58-441) (the defendant hotel was held liable for damages for the death of a guest caused by a defective heater). Rand J., Cartwright J. (Fauteux and Abbott JJ. concurring); Locke J. dissenting. *McCormack v. T. Eaton Co. Ltd.* (63-180) (new trial directed on application of a plaintiff injured on a department store escalator). Kerwin C.J. (Taschereau J., as he then was, and Cartwright and Fauteux JJ. concurring); Judson J. dissented. See *supra*, footnote 100, and *infra*, footnote 150; and *Kauffman v. T.T.C.* (60-251). Cartwright J. dissenting, held that the defendant transportation commission owed a duty to the plaintiff invitee, a user of its escalator, to provide such supervision that the escalator would be stopped in an emergency. Kerwin C.J. (Judson J. concurring), held that the defendant had no such duty; Locke J. (Martland J. concurring), held that under the circumstances the defendant had no such duty.

¹³¹ *Gilchrist v. A. & R. Farms Ltd.* (66-122), *supra*, footnote 104.

practice appeal.¹³²

Mr. Justice Cartwright's voting pattern on the N scale suggests the hypothesis that in negligence appeals, where it is possible upon the law to do so, he attempts, as a matter of policy, to promote the wide distribution of the risks inherent in modern society. There is little evidence to rebut that hypothesis as an explanation of his voting behaviour in motor vehicle appeals.¹³³ However, three of his negative inconsistent votes cast some doubt on the validity of that hypothesis as an explanation of his voting behaviour in the non-motor vehicle appeals. In *Hobbs Mfg. Co. v. Shields* (62-716), he dissented to hold that the manufacturer of a defective machine was not liable for damages arising from the death of an electrician who was electrocuted when, in the course of his employment with the purchaser of the machine, he connected it to an electric current.¹³⁴ In *Fleming v. Atkinson* (59-513), again dissenting, he held that the farmer-owner of a field adjoining the highway, has no duty to take reasonable care to keep his farm animals off the highway and is not liable for the injuries they cause.¹³⁵ In *Marwell Equipment Ltd. v. Vancouver Tug Boat Co.* (61-43), he once again dissented to interpret broadly the exculpatory provisions of section 657(d) of the Canada Shipping Act.¹³⁶

These negative inconsistent votes are not easily reconciled with the hypothesis suggested above, particularly as they occurred in appeals in which the majority voted affirmatively and so gave effect to the policy hypothesized for Mr. Justice Cartwright. As in the case of Mr. Justice Cartwright's negative inconsistent votes

¹³² *Radclyffe v. Rennie & McBeath*, *supra*, the text at footnote 121.

¹³³ His judgment in *Co-operators Insurance Association v. Kearney*, discussed *supra*, at footnote 125, suggests that in that appeal he was of the view that the words of the statute clearly negated the plaintiff's claim. It is true, of course, that this view was not shared by the majority judges.

¹³⁴ Cartwright J. concurred with Ritchie J., *supra*, footnote 103, at p. 728, that the manufacturer was not liable under the doctrine of *Donoghue v. Stevenson*, [1932] A.C. 562, as there was a reasonable probability that the defect would be discovered by examination (*i.e.* by "grounding" the machine) before use. Kerwin C.J. (Martland and Judson JJ. concurring), held, at p. 719, that there was no duty upon the plaintiff to inspect, and no reason to do so.

¹³⁵ Cartwright J. held, *supra*, footnote 102, at pp. 531-532, that he was bound to apply the English rule in *Searle v. Wallbank*, [1947] A.C. 341. Locke J. joined Cartwright J. in dissent, but on different grounds. Judson J. (Fauteux and Abbott JJ. concurring), held that *Searle v. Wallbank* was not good law in Ontario. Rand J. (Taschereau J., as he then was, concurring), held the rule to be inapplicable in the circumstances.

¹³⁶ *Supra*, footnote 101. The Canada Shipping Act, R.S.C., 1952, c. 29. Cartwright J. held that the section limits a shipowner's liability not only for damages caused to another ship but also for the cost of raising and

on the Taxation Scale,¹³⁷ these votes may perhaps be explained as votes which Cartwright J. felt to be dictated by the law as he saw it. A final judgment on the validity of the hypothesis suggested above and on the significance of Mr. Justice Cartwright's negative votes must await an analysis of all his decisions in negligence cases during his entire term on the bench.¹³⁸

As Judson J. voted against plaintiffs' claims in twelve of his twenty-one participations (casting six inconsistent negative votes),¹³⁹ his voting division (.43 affirmative) suggests classification as neutral with a pro-defendant tendency. Nevertheless, it appears more accurate to classify his voting pattern as neutral with a pro-plaintiff tendency for two reasons. First, he voted in favour of plaintiffs' claims in the occupier's liability appeal (64-85),¹⁴⁰ the appeal considering the scope of section 105(2) of the Ontario Highway Traffic Act (65-106),¹⁴¹ the employer's liability appeal (66-122)¹⁴² and the medical malpractice appeal (65-703)¹⁴³ in which all justices to his right on the N scale who participated voted negatively. His votes in these cases produce the low break-point and the scale score of .31 which characterize his voting pattern.

Secondly, four of his six inconsistent negative votes appear to be votes on the degree of restraint to be exercised by the Supreme

removing the damaged ship. Martland J. (Ritchie and Judson JJ. concurring), restricted the limitation on liability to the first head of damages. Locke J. joined Cartwright J. in dissent, giving separate reasons.

¹³⁷ *Supra*, text at footnote 69 and following.

¹³⁸ Mr. Justice Cartwright's inconsistent vote in *Garland Steamship Co. et al v. The Queen* (60-315), *supra*, footnote 101, is perhaps more readily explained. In that action, the Crown sought damages from the steamship company for injuries to a Crown-owned bridge sustained when the bridge was hit by a ship owned by the appellant company. Judson J. (Taschereau J., as he then was, and Cartwright J. concurring), apportioned two-thirds of the fault for the collision to the Crown's servants (although the Exchequer Court judge had absolved them of negligence), and held that the Crown was not entitled to damages for the loss of use of the channel and the bridge. Locke J. (Martland J. concurring), dissented on both grounds. Mr. Justice Cartwright's vote in favour of the defendant in this case, may perhaps be understood as one which protects a private company from liability at the suit of the Crown. His negative vote is more consistent with his voting pattern in taxation, and criminal law cases than it is with his voting pattern in negligence cases. Nevertheless the case is not omitted from the N scale as it clearly raises the question of liability for damages negligently caused and the desirability of insuring against such damages.

¹³⁹ Five of the inconsistent negative votes were cast in motor vehicle cases (64-122, 66-13, 65-145, 66-457 and 65-324), and, therefore, Judson J. ranks eleventh on the right side of the MV subscale. He ranks sixth on the N scale and the subscale of appeals other than motor vehicle appeals.

¹⁴⁰ *Campbell v. Royal Bank of Canada*, *supra*, footnote 114.

¹⁴¹ *Co-operators Insurance v. Kearney*, *supra*, text at footnote 125.

¹⁴² *Gilchrist v. A. & R. Farms Ltd.*, *supra*, footnote 115.

¹⁴³ *Radclyffe v. Rennie and McBeath*, *supra*, text at footnote 121.

Court in the supervision of lower courts, rather than votes on questions of substantive law relating to plaintiffs' claims for compensation. His inconsistent negative votes in three motor vehicle appeals (66-13, 65-145 and 65-457)¹⁴⁴ upheld the decisions of provincial courts of appeal decreasing the quantum of damages awarded by the trial judge. He stated that he based his vote on the view that the Supreme Court should be slow to interfere with the quantum of damages reviewed and fixed by a court of appeal.¹⁴⁵ Mr. Justice Judson adhered to that view in *Hossack v. Hertz* (66-28),¹⁴⁶ in which he voted consistently negative to uphold the appeal court's judgment decreasing the award of damages, and in *Lehnert v. Stein* (63-38),¹⁴⁷ in which he voted consistently affirmative to uphold the appeal court's increase in the quantum of damages. The only appeal in which he did not vote on this basis was *Dormuth v. Untereiner* (64-122)¹⁴⁸ in which he voted inconsistently negative to reverse the appeal court's judgment increasing the quantum of damages.

Mr. Justice Judson's fifth inconsistent negative vote was cast in *McCormack v. T. Eaton Co. Ltd.* (63-180),¹⁴⁹ which again did not raise a substantive issue. Dissenting, he upheld the manner in which the trial had been conducted.¹⁵⁰

As Mr. Justice Judson's inconsistent negative votes in *Gorman*, *Roumieu*, *Corrie* and *McCormack* were not based on substantive

¹⁴⁴ *Gorman v. Hertz*, *Roumieu v. Osborne and Corrie v. Gilbert*, *supra*, footnote 99.

¹⁴⁵ Mr. Justice Judson stressed that the task of the Supreme Court is not to retry the issues (*Corrie v. Gilbert*, *supra*, footnote 99, at p. 458), or to say whether it would have done the same thing as the Court of Appeal (*Roumieu v. Osborne*, *supra*, footnote 99, at p. 148), but only to determine whether the Court of Appeal committed a reversible error. He concluded in each case that the Court of Appeal was right in holding that the awards at trial were clearly unreasonable and unsupported by the evidence, or so excessively high as to be clearly erroneous (*Hossack v. Hertz*, *supra*, footnote 99, at p. 32). He stressed that the quantum of damages is related to local conditions best known to the courts of appeal (*Roumieu v. Osborne*, at p. 148), that those courts should have a wide power of review, and that the Supreme Court, if it recognizes that the case was one for review, should be slow to interfere. (*Hossack v. Hertz*, at p. 34).

¹⁴⁶ *Supra*, footnote 99.

¹⁴⁷ *Ibid.* In this case, however, the primary issue discussed by the court was a question of substantive law—whether the plaintiff's action was barred by the doctrine *volenti non fit injuria*.

¹⁴⁸ *Supra*, footnote 99.

¹⁴⁹ *Supra*, footnote 100.

¹⁵⁰ Kerwin C.J. (Taschereau J. as he then was, and Cartwright and Fauteux JJ. concurring), allowed the plaintiff's appeal and ordered a new trial, on the ground that the jury had been confused by the supplementary charges, questions and suggestions put to them by the trial judge, and that the trial and its results were so unsatisfactory that the verdict could not stand. The substantive issue—the duty of care owed by a department store to its customers in connection with an escalator—was not considered.

issues of negligence, it is suggested that, considering the other features of his voting pattern, they should not be given full weight in classifying this voting pattern on the N scale. Thus, the evidence suggests that a classification as neutral with a pro-plaintiff tendency accurately reflects Mr. Justice Judson's voting behaviour in negligence cases, notwithstanding his voting division. The verification or rejection of this classification must, of course, await the accumulation of further evidence, and further study of the extent to which judicial restraint plays a significant role in Supreme Court decision-making.¹⁵¹

Taschereau C.J., whose voting pattern is classified as pro-plaintiff, voted affirmatively in four of the seven motor vehicle appeals in which he participated.¹⁵² Of the appeals other than motor vehicle appeals, he voted affirmatively in an occupier's liability appeal (63-180),¹⁵³ the farm animals appeal (59-513)¹⁵⁴ and the "gardien juridique" appeal (59-785)¹⁵⁵ and the summer camp liability appeal (62-519)^{155A} and negatively in the Crown bridge appeal (60-315).¹⁵⁶ His only inconsistent vote appears in *Gagnon v. Deroy* (58-708).¹⁵⁷

¹⁵¹ Two possible areas of study are the extent to which the justices defer to a lower court's finding of fact (see *supra*, footnote 98), and the extent to which they defer to the decisions of administrative tribunals. If there were significant numbers of cases in which the provincial appeal courts increased and decreased the awards made at trial, it would be possible, through the use of subscales, to attempt to determine whether the effect of the justices' votes is to defer to the courts of appeal equally in both types of cases. It is possible that some justices uphold the appeal courts' decisions proportionately more frequently when those courts decrease the quantum of damages than when they increase it or *vice versa*. If such a voting pattern were revealed by subscales, it would suggest that regardless of what is said in the reasons for judgment, these justices vote not in response to deference to appellate courts but in response to the effect of the appellate courts' awards on the parties. However, such subscales (not reproduced here) do not show significant results as the number of appeals is too small and as not all justices participated in all of the relevant appeals. On the use of subscales see H. J. Spaeth, *Warren Court Attitudes Toward Business: The B Scale in Schubert's Judicial Decision-Making* (1963), *The Free Press of Glencoe* 79, at pp. 91-100; *An Analysis of Judicial Attitudes in the Labor Decisions of the Warren Court* (1963), 22 *J. of Pol.* 290, at pp. 299-308.

¹⁵² *Dornmuth et al. v. Untereiner et al.* (64-122); *Roumieu v. Osborne* (65-145); *Ratté v. Provencher* (64-606); and *Co-operators Insurance Association v. Kearney* (65-106). He voted negatively in *Gagnon v. Deroy* (58-708); *Driver et al v. Coca-Cola Ltd.* (61-201) and *Robitaille v. Procureur Général de Québec* (63-186) cited, *supra*, footnote 99.

¹⁵³ *McCormack v. T. Eaton Co. Ltd.*, *supra*, footnotes 100 and 150.

¹⁵⁴ *Fleming v. Atkinson*, *supra*, text at footnote 135.

¹⁵⁵ *M. & W. Cloaks Ltd. v. Cooperberg and Davis*, *infra*, footnote 178.

^{155A} *Grieco v. L'Externat Classique*, *supra*, footnote 107A.

¹⁵⁶ *Garland Steamship Co. v. The Queen*, *supra*, footnote 138.

¹⁵⁷ This was a motor vehicle negligence appeal arising under the Quebec Civil Code in which Taschereau C.J. and Fauteux J.J., the only two civilian

Mr. Justice Martland's votes are fairly evenly divided between support for plaintiffs and for defendants on both subscales, although his voting pattern slightly favours plaintiffs on the MV subscale and defendants on the second subscale. On the latter subscale, he voted affirmatively in the appeal interpreting the exculpatory provision of the Canada Shipping Act (61-43)¹⁸⁸ the manufacturer's liability appeal (62-716)¹⁸⁹ and the Crown bridge appeal (60-315),¹⁹⁰ his only inconsistent vote on the N scale. He voted negatively in two occupier's liability appeals (64-85 and 60-251),¹⁹¹ the employer's liability appeal (66-122)¹⁹² and the municipal drainage ditch appeal (65-377).¹⁹³

The subscales indicate a different type of voting pattern for Ritchie J. Although his votes in the motor vehicle appeals are fairly evenly divided (five affirmative and six negative), his votes in the other appeals uphold the plaintiff's claim in only one appeal of the six which he heard. He voted affirmatively in the Canada Shipping Act appeal (61-43),¹⁹⁴ and negatively in the appeals involving manufacturer's liability (62-716),¹⁹⁵ occupier's liability (64-85),¹⁹⁶ employer's liability (66-122),¹⁹⁷ medical malpractice (65-703)¹⁹⁸ and the municipal drainage ditch appeal (65-377).¹⁹⁹

Mr. Justice Abbott's voting patterns on the subscales contrast judges hearing the appeal, dissented and voted negatively. They held that the driver of the automobile owned by the defendant, who was regularly employed as the defendant's chauffeur, was not the defendant's servant at the time of the accident, and therefore that the defendant was not liable for damages flowing from the driver's negligence. The majority held that although the chauffeur was driving without pay, on a Sunday, at the request of the defendant's nephew, he was the defendant's servant at the time of the accident, as the defendant had lent his car to his nephew on condition that it be driven only by the chauffeur. Although the civilian and common law judges disagree in this case, the reasons for judgment do not suggest that the differences between them were related to differences in cultural values or professional background. That such factors were not instrumental in the decision is suggested further by the fact that the common law judges upheld the Quebec Court of Appeal.

¹⁸⁸ *Marwell Equipment Ltd. v. Vancouver Tug Boat Co.*, *supra*, text at footnote 136.

¹⁸⁹ *Hobbs Mfg. Co. v. Shields*, *supra*, text at footnote 134.

¹⁹⁰ *Gartland Steamship Co. v. The Queen*, *supra*, footnote 138.

¹⁹¹ *Campbell v. Royal Bank of Canada*, *supra*, footnote 114, and *Kauffman v. Toronto Transit Commission*, *supra*, footnote 130.

¹⁹² *Gilchrist v. A. & R. Farms Ltd.*, *supra*, footnote 115.

¹⁹³ *North Vancouver v. McKenzie Barge & Marine Ways Ltd.*, *supra*, footnote 119.

¹⁹⁴ *Marwell Equipment Ltd. v. Vancouver Boat Co. Ltd.*, *supra*, text at footnote 136.

¹⁹⁵ *Hobbs Mfg. Co. v. Shields*, *supra*, text at footnote 134.

¹⁹⁶ *Campbell v. Royal Bank of Canada*, *supra*, footnote 114.

¹⁹⁷ *Gilchrist v. A. & R. Farms Ltd.*, *supra*, footnote 115.

¹⁹⁸ *Radclyffe v. Rennie and McBeath*, *supra*, text at footnote 121.

¹⁹⁹ *North Vancouver v. McKenzie Barge & Marine Ways Ltd.*, *supra*, footnote 119.

with those of Mr. Justice Ritchie. He voted negatively in the seven motor vehicle appeals in which he participated, and divided his votes evenly (three affirmative and three negative) in the other appeals. He cast affirmative votes in an occupier's liability appeal (58-441),¹⁷⁰ the summer camp's liability appeal (62-519)^{170A} and in the farm animals appeal (59-513);¹⁷¹ he cast negative votes in the medical malpractice appeal (65-703),¹⁷² the "gardien juridique" appeal (59-785)¹⁷³ and the municipal drainage ditch appeal (65-377).¹⁷⁴

His break zone on the N scale is established by his negative votes in 65-145 and 65-457,¹⁷⁵ motor vehicle appeals in which he concurred with Judson J., upholding the appellate court's reduction of the quantum of damages awarded at trial. These votes may place Abbott J. further to the right on the N scale than is warranted by his votes on substantive questions of liability in negligence cases. That such error is likely minimal is suggested by his five negative votes in the other motor vehicle appeals and by his position on the second subscale. However, some caution about Mr. Justice Abbott's voting pattern in negligence cases is justified until a scale covering his full term on the court is prepared and analysed.

Mr. Justice Fauteux's voting patterns on the subscales differ from those of Martland, Ritchie and Abbott JJ., which, as indicated above, differ from each other. Mr. Justice Fauteux voted negatively in the four motor vehicle appeals which he heard, and affirmatively in the five non-motor vehicle appeals: two occupier's liability appeals (58-441 and 63-180),¹⁷⁶ the farm animals appeal (59-513),¹⁷⁷ the summer camp appeal (62-519)^{177A} and the "gardien juridique" appeal (59-785) in which he voted inconsistently.¹⁷⁸

¹⁷⁰ *Cariss v. Buxton*, *supra*, footnote 130.

^{170A} *Gricco v. L'Externat Classique*, *supra*, footnote 107A.

¹⁷¹ *Fleming v. Atkinson*, *supra*, text at footnote 135.

¹⁷² *Radelyffe v. Rennie*, *supra*, text at footnote 121.

¹⁷³ *M. & W. Cloaks Ltd. v. Cooperberg and Davis*, *infra*, footnote 178.

¹⁷⁴ *North Vancouver v. McKenzie Barge and Marine Ways Ltd.*, *supra*, footnote 119.

¹⁷⁵ *Roumieu v. Osborne and Corrie v. Gilbert*, *supra*, text at footnote 144.

¹⁷⁶ *Cariss v. Buxton*, *supra*, footnote 130; *McCormack v. T. Eaton Co Ltd.*, *supra*, footnotes 100 and 150.

¹⁷⁷ *Fleming v. Atkinson*, *supra*, text at footnote 135.

^{177A} *Gricco v. L'Externat Classique*, *supra*, footnote 107A.

¹⁷⁸ *M. & W. Cloaks Ltd. v. Cooperberg and Davis*, *supra*, footnote 173. Fauteux J. joined Taschereau J., as he then was, in dissent. The plaintiff claimed damages for injuries caused to his goods by a defective steam generating system located in the defendant's building in which the plaintiff rented business quarters. The minority held that the defendant could

As a result he ranks tenth on the MV subscale and second on the second subscale.

Thus, the subscales indicate that Ritchie, Abbott and Fauteux JJ. each votes differently in motor vehicle appeals than he does in non-motor vehicle appeals. Although the number of appeals of each type is small, the differences in voting behaviour suggest that the two types of appeals contain different elements to which a justice may react in different ways.^{178A}

C) The Criminal Law Scale

The Criminal Law Scale (C)¹⁷⁹ contains twenty-nine divided decisions in appeals arising under the Criminal Code and other legislation creating criminal offences, heard by the Supreme Court of Canada after January 15th, 1958, and reported in the

not escape liability as "gardien juridique" under article 1054 of the Quebec Civil Code as it was not established that the defendant was unable, by reasonable means, to prevent the damage. The majority (Chief Justice Kerwin, and Abbott and Judson JJ.) held that the defendant could not have prevented the damage by reasonable means and therefore was not liable.

This decision presents an interesting comparison with the decision in *Gagnon v. Derooy* (58-708), *supra*, footnote 157, in which Taschereau J., as he then was, voted inconsistently joining Fauteux J. In the present case, Abbott J., the third civilian on the court, participated and voted with the majority to uphold the decision of the Quebec Court of Appeal.

^{178A} The R and S coefficients on the N scale indicate, on the basis of Guttman theory, that the cases on the scale are not unidimensional. See, *supra*, text at footnote 109.

¹⁷⁹ In the construction of the C scale, I treat cases with a voting division of 3-2, 4-3 and 5-4 as members of the same voting division group for the purpose of re-arranging cases to reduce to a minimum the number of inconsistent votes. After arranging the cases with those voting divisions for that purpose, I arrange them on the scale in groups according to their actual voting division. I deal with cases having a voting division of 4-5, 3-4 and 2-3 in the same way.

I have omitted from the C scale the following: (a) Three appeals in which the court upheld the validity of provincial prohibitory legislation: *Smith v. The Queen*, [1960] S.C.R. 776. The Securities Act, R.S.O., 1950, c. 351, s. 63, held not in conflict with s. 343 of the Criminal Code (prohibition against the inclusion of false information in a prospectus). *O'Grady v. Sparling*, [1960] S.C.R. 804. The Manitoba Highway Traffic Act, R.S.M., 1954, c. 112, s. 55(1) held not in conflict with s. 221(1) of the Criminal Code (criminal negligence in the operation of a motor vehicle). *Stephens v. The Queen*, [1960] S.C.R. 823. The Highway Traffic Act, R.S.M., 1954, c. 112, s. 147(1) (failure to remain at or return to the scene of an accident and render assistance) held not in conflict with s. 221(2) of the Criminal Code (failure to stop and render assistance, with intent to escape civil or criminal liability). (b) Three appeals in which the court considered charges brought under the Lord's Day Act, R.S.C., 1952, c. 171, s. 4, which makes it an offence for any person to carry on or transact any business of his ordinary calling on Sunday (with certain exceptions). The majority allowed

1958 to 1966 volumes of the *Supreme Court Reports*. The C scale includes nine appeals arising from charges of homicide,¹⁸⁰ four appeals arising from charges of keeping a common gaming or betting house,¹⁸¹ three appeals in connection with theft and robbery,¹⁸² three appeals arising from charges of fraud and forgery,¹⁸³ two appeals in connection with sentences of preventive detention following a finding of habitual criminality,¹⁸⁴ two appeals in connection with summary conviction offences,¹⁸⁵ one appeal in connection with a charge of interfering with the administration of justice,¹⁸⁶ two appeals arising under the Opium and Narcotic Drug Act,¹⁸⁷ and one appeal arising under each of the Food and Drugs

the appeal of the accused, *The Canadian Broadcasting Corporation*, in *C.B.C. v. A.-G. for Ontario*, [1959] S.C.R. 188. The majority dismissed the appeal of an operator of an automatic laundry in *Gordon v. The Queen*, [1961] S.C.R. 592. Notwithstanding the provisions of the Canadian Bill of Rights, 1960, S.C., c. 44, the court dismissed the appeal of a bowling alley operator in *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 651. (c) One obscenity appeal: *Brodie, Dansky and Rubin v. The Queen*, [1962] S.C.R. 681 (the book "Lady Chatterley's Lover" held not to be an obscene publication).

¹⁸⁰ *Rustad v. The Queen*, [1965] S.C.R. 555 (charge of non-capital murder, Criminal Code, s. 201; conviction of manslaughter, Criminal Code, ss. 203, 569); *More v. The Queen*, [1963] S.C.R. 522 (capital murder, Criminal Code, s. 202A); *Colpitts v. The Queen*, [1965] S.C.R. 739 (capital murder); *The Queen v. Warner*, [1961] S.C.R. 144 (murder); *Workman and Huckulak v. The Queen*, [1963] S.C.R. 266 (capital murder); *La Reine v. Coté*, [1964] S.C.R. 358 (capital murder); *The Queen v. Taylor*, [1963] S.C.R. 491 (negligence causing death, Criminal Code, s. 192); and *Salamon v. The Queen*, [1959] S.C.R. 404 and *Brown v. The Queen*, [1962] S.C.R. 371 (murder).

¹⁸¹ See Criminal Code, S.C., 1953-54, c. 51, ss. 168, 170, 176. *The Queen v. Topechka*, [1960] S.C.R. 898 (common gaming house—slot machine); *The Queen v. Kerim*, [1963] S.C.R. 124 (common gaming house—bingo games); *Silvestro v. The Queen*, [1965] S.C.R. 155 (common betting house); *The Queen v. Toupin*, [1965] S.C.R. 275 (common gaming house—slot machine).

¹⁸² *The Queen v. Cumming*, [1962] S.C.R. 507 (theft from the mail, Criminal Code, s. 298); *The Queen v. Laroche*, [1964] S.C.R. 667 (theft by conversion, Criminal Code, s. 269(1)); *The Queen v. George*, [1960] S.C.R. 871 (robbery with violence, Criminal Code, s. 288).

¹⁸³ *The Queen v. Lemire*, [1965] S.C.R. 174 (fraud, Criminal Code, s. 323(1)); *Cowan v. The Queen*, [1962] S.C.R. 476 (forgery, Criminal Code, s. 309(1)); *Koury v. The Queen*, [1964] S.C.R. 212 (fraud and conspiracy to commit fraud, Criminal Code, ss. 323(1), 408).

¹⁸⁴ Criminal Code, s. 660. *The Queen v. MacDonald*, [1965] S.C.R. 831; *Gordon v. The Queen*, [1965] S.C.R. 312.

¹⁸⁵ *Paul v. The Queen*, [1960] S.C.R. 452 (impaired driving, Criminal Code, s. 223); *Dennis v. The Queen*, [1958] S.C.R. 473 (impaired driving).

¹⁸⁶ *Wright, McDermott and Feeley v. The Queen*, [1963] S.C.R. 539 (Criminal Code, ss. 101(b) and 408; the case also involved a charge, not considered on appeal, of keeping a common gaming house, Criminal Code, s. 176(1)).

¹⁸⁷ R.S.C., 1952, c. 201, as re-enacted by S.C., 1953-54, c. 38. *Goldhar v. The Queen*, [1960] S.C.R. 60; *McDonald v. The Queen*, [1960] S.C.R. 186.

Act,¹⁸⁸ the Saskatchewan Coroner's Act,¹⁸⁹ and the Migratory Birds Convention Act.¹⁹⁰

The C scale is constructed to make possible an examination of the effect of the justices' votes on prosecutions brought by the Crown under the Criminal Code and other statutes creating criminal offences. A vote favouring the acquittal of an accused, or acquittal on the more serious of two charges, or the granting of a new trial or of leave to appeal when requested by the accused, is classified as affirmative; a vote favouring conviction, or conviction on the more serious of two charges, or the granting of a new trial or of leave to appeal when requested by the Crown, is classified as negative. Thus, an affirmative vote has the effect of shielding an accused from prosecution or assuring him of fairer or, at least, more favourable treatment in a second trial, or benefiting him in some other way. A negative vote has the effect of promoting the Crown's ability to prosecute and obtain a conviction, and of assuring that the Crown receives fairer or more favourable treatment in the lower courts.

The C scale has an R of .93 and an S of .68. The difference between the observed consistency and the minimum consistency possible (computed for justices),¹⁹¹ given the structure of the scale is .15. Accordingly, the scale exhibits the degree of consistency conventionally accepted as establishing the unidimensionality of items on a Guttman cumulative scale.¹⁹²

In spite of the incidence of non-participation¹⁹³ resulting from the court's practice of sitting in panels, the C scale indicates five fairly clear and distinct types of voting behaviour.

1. The voting pattern described for Mr. Justice Cartwright may be classified as very pro-accused, on the basis both of the high

¹⁸⁸ S.C., 1952-53, c. 38, s. 25(b). *Kipp v. Att-Gen. for Ontario*, [1965] S.C.R. 57.

¹⁸⁹ Coroner's Act, R.S.C., 1953, c. 106, ss. 8, 8a, 15, 20, as am. by S.S., 1960, c. 14. *Batary v. A.-G. for Saskatchewan*, [1965] S.C.R. 465.

S. 5, which rendered a person charged with murder compellable to give evidence at the inquest on the body of his alleged victim, was held to be *ultra vires* the provincial legislature, as legislation in relation to criminal law and procedure in criminal matters.

¹⁹⁰ R.S.C., 1952, c. 179. *The Queen v. George*, [1966] S.C.R. 267.

¹⁹¹ The MMR for justices is .78, the MMR for cases is .69.

¹⁹² But, see, *supra*, text at footnote 50.

¹⁹³ The scale contains 180 votes. If nine justices participated in each of the twenty-nine cases, it would contain 261 votes. Accordingly, eighty-one non-participations result from the courts practice of sitting in panels. An additional eighty-seven non-responses result from the inclusion on the scale of a column for each of the twelve justices who were on the court at any time during the eight years under review.

		CRIMINAL SCALE (C)												
Voting division		1.00	.82	.80	.67	.55	.35	.18	.40	.15	.19	0.00		
Scale score		1.00	.55	.38	.38	-.17	-.21	-.48	-.59	-.72	-.90	-1.00		
		C	H	S	K	R	M	A	L	J	T	F	Ra	
Batary	65-465	+		+		+	+			+	+	—	6-1	
Rustad	65-555	+	+	+		+		(—)				—	4-1	
More	63-522	+	+			+		+		+	—	—	5-2	
MacDonald	65-831	+	+			+	(—)	+		+	—	—	5-2	
Topechka	60-898					+	+			—	(+)	—	3-2	
Brown	62-371	+				+	+		+	—	—	—	3-2	
Warner	61-144	+			(+)	+	(—)	+	—	—	(+)	—	5-4	
Kerim	63-124	+				+	+		—	—	—	—	3-2	
Colpitts	65-739	+	+	+		+		—	—	—	—	—	4-3	
Paul	60-452	+				+	+	—		—	—	—	3-4	
Dennis	58-473				+		+		—	—	—	—	2-3	
Cowan	62-476	+				+	—	—		—	—	—	2-3	
Lemire	65-174	+		+		—	—	—			(+)	—	3-4	
Cumming	62-507	+				—	—	—		—	(+)	—	2-3	
Wright, McDermott	63-539	+	+			—	—	—		—	—	—	2-3	
Kipp	65-57	+		+		—	—	—		—	—	—	2-3	
Silvestro	65-155	+		+		—	—	—		—	—	—	2-3	
Workman & Huculak	63-266		+			(+)	—	—		—	—	—	2-4	
Coté	64-358	+	+	+		—	—	—		—	—	—	3-6	
Laroche	64-667	+	+	+		—	—	—		—	—	—	3-6	
Koury	64-212	+	+	—		(+)	—	—		—	—	—	3-6	
Goldhar	60-60	+				—	—	—		—	—	—	1-4	
George	60-871		—	—		—	—	—	(+)	—	—	—	1-4	
Taylor	63-491	+	—	—		—	—	—		—	—	—	1-4	
Toupin	65-275	+	—			—	—	—		—	—	—	1-4	
Gordon	65-312	+		—		—	—	—		—	—	—	1-4	
Salamon	59-404	+				—	—	—	—	—	—	—	1-6	
McDonald	60-186	+				—	—	—		—	—	—	1-6	
George	66-267	+	—			—	—	—		—	—	—	1-6	
29 appeals		+	25	9	8	2	12	6	3	2	3	5	0	
		—	0	2	2	1	10	11	14	3	17	21	24	
			25	11	10	3	22	17	17	5	20	26	24	

R = .93

S = .68

R—MMR (computed for justices) = .15

+ = pro-accused

— = pro-Crown

() inconsistent votes are shown in brackets

180 participations

scale score of 1.00 and of his voting division of twenty-five affirmative votes in twenty-five participations (1.00 affirmative).

2. The voting patterns of Mr. Justice Hall and Mr. Justice Spence are identified as pro-accused by the scale scores of .55 and .38 respectively, and as very pro-accused by the voting division of nine affirmative and two negative votes for Hall J. (.82 affirmative), and eight affirmative and two negative votes for Spence J. (.80 affirmative). Adopting the measure which gives the less extreme result, the voting patterns should be classified as pro-accused.

3. Mr. Justice Ritchie's voting pattern may be classified as neutral according to the voting division of twelve affirmative votes as against ten negative votes (.55 affirmative), and his scale score of $-.17$.

4. Two justices, (Martland and Abbott JJ.) exhibit voting patterns which may be classified as pro-Crown.

(a) Mr. Justice Martland's voting pattern characterized by a scale score of $-.21$ and a voting division of six affirmative votes out of seventeen participations (.35 affirmative) is identified as pro-Crown on the basis of both measures.

(b) Mr. Justice Abbott's voting pattern is identified as pro-Crown on the basis of his scale score of $-.48$, and highly pro-Crown on the basis of his voting division of fourteen negative votes in seventeen participations (.18 affirmative).

Although the voting patterns of both of these justices are classified as pro-Crown, Mr. Justice Martland's voting pattern is more moderately so than is that of Mr. Justice Abbott.

5. The scale describes highly pro-Crown voting patterns for three justices—Judson J., Taschereau C.J. and Fauteux J. The classification is suggested both by their high scale score ($-.72$, $-.90$ and -1.00) and by their voting divisions. Judson J. cast seventeen pro-Crown votes in twenty participations (.15 affirmative); Taschereau C.J. cast twenty-one pro-Crown votes in twenty-six participations (.19 affirmative) and Fauteux J. upheld the Crown in the twenty-four appeals in which he participated (.0 affirmative).

Mr. Justice Rand did not participate in any of the appeals which appear on the C scale. Chief Justice Kerwin and Mr. Justice Locke participated in three and five appeals respectively. For the reasons expressed in connection with the T scale and the N scale, we are unable to draw any conclusions about the voting patterns of these justices from the C scale.

In deciding the twenty-nine appeals on the C scale, the justices were called upon to consider five general types of legal problems: the adequacy of the charge of the trial judge, questions of statutory construction, whether the court had jurisdiction to hear the appeal, the special pleas of *res judicata*, *autrefois acquit* and inconsistent verdict, and defects in the procedure followed by one of the parties. It is beyond the scope of this article to discuss the legal considerations which govern each of these matters. I propose, however, to indicate briefly the diversity of the issues considered by the court in these appeals, and to point out that notwithstanding that diversity, Cartwright, Hall and Spence JJ. voted affirmatively in over eighty per cent of the cases in which they participated, and Taschereau C.J., and Abbott, Judson and Fauteux JJ. voted negatively in over eighty per cent of the cases in which they participated.

In eleven appeals, the court considered the adequacy of the directions given by the trial judge to the jury or to himself as the trier of fact. These appeals included seven cases of homicide¹⁹⁴ and one each of forgery,¹⁹⁵ keeping a common betting house,¹⁹⁶ theft by conversion¹⁹⁷ and robbery with violence.¹⁹⁸ Mr. Justices Cartwright,

¹⁹⁴ *Rustad v. The Queen* (65-555) (whether the trial judge dealt adequately with, *inter alia*, the effect to be given to evidence that the accused was intoxicated, when assessing the validity of a confession); *More v. The Queen* (63-522) (the effect to be given to medical evidence called by the defence to show that the state of mind of the accused was such that he was incapable of a "planned and deliberate" murder, that is, capital murder); *Colpitts v. The Queen* (65-739) (whether the trial judge failed to comment adequately on the evidence given by the accused that his confession was false and was given to protect a friend; and the effect of s. 592 (1)(b)(iii) of the Criminal Code); *Workman and Huculak v. The Queen* (63-266) (failure in the circumstances to charge the jury that it was open to them to find that one of two accused was an accessory only); *La Reine v. Côté* (64-358) (whether the charge left the jury with the impression that it could convict the accused of capital murder even if the bodily harm which caused the death was inflicted by a third party with whom the accused was engaged in committing a theft, without any assistance from the accused); *Salamon v. The Queen* (59-404) (whether the trial judge should have directed the jury on the question of provocation, and the effect of drunkenness on provocation); *Brown v. The Queen* (62-371) (the degree of negligence required to convict of manslaughter), cited, *supra*, footnote 180.

¹⁹⁵ *Cowan v. The Queen* (62-476) *supra*, footnote 183 (a direction that the jury was entitled to rely on the truth of a letter which was improperly admitted in evidence; further, whether the record contained any evidence to establish the defence relied on).

¹⁹⁶ *Silvestro v. The Queen* (65-155), *supra*, footnote 181 (a direction that a conviction should not be entered unless the Crown proves not only that the accused kept a house for the purpose of receiving bets but also the manner in which such bets were received).

¹⁹⁷ *The Queen v. Laroche* (64-667), *supra*, footnote 182 (the brevity of certain parts of the charge to the jury).

¹⁹⁸ *The Queen v. George* (60-871), *ibid.* (the duty of the trial judge

Hall and Spence, the three justices located on the left side of the scale, voted affirmatively in all of these appeals in which they participated (nine, six and five participations respectively).¹⁹⁹ Mr. Justice Ritchie, whose voting pattern was identified on the C scale as neutral, voted affirmatively five times and negatively four times.²⁰⁰ Martland J., who ranks immediately to the right of Ritchie J. on the C scale, voted negatively in five such appeals²⁰¹ located in the bottom half of the C scale and voted affirmatively in one.^{201A} Mr. Justices Abbott and Judson voted negatively in six of their seven participations.²⁰² Taschereau C.J. and Fauteux J., located on the right side of the C scale and having highly pro-Crown voting patterns, voted negatively in the nine appeals in which they participated.²⁰³

In the seven appeals raising a question of statutory interpretation,²⁰⁴ Cartwright J. voted affirmatively in the five cases²⁰⁵ in

to consider an included offence not raised by the Crown; the effect of intoxication on the ability to form the intent to commit common assault).

¹⁹⁹ Cartwright J. participated in *Rustad, More, Brown, Colpitts, Cowan, Silvestro, Coté, Laroche and Salamon*; Hall J. participated in *Rustad, More, Colpitts, Workman and Huculak, Coté, Laroche*; Spence J. participated in *Rustad, Colpitts, Silvestro, Coté, Laroche, supra*, footnotes 194 to 198.

²⁰⁰ Affirmatively in *Rustad, More, Colpitts, Cowan, Workman and Huculak*; negatively in *Silvestro, Coté, Laroche, George, supra*, footnotes 192 to 198.

²⁰¹ *Workman and Huculak, Coté, Laroche, George, Salamon, supra*, footnotes 194 to 198.

^{201A} *Brown, supra*, footnote 194.

²⁰² Both voted affirmatively in *More* and negatively in *Colpitts, Workman and Huculak, Coté, Laroche, and Salamon*. Abbott J. voted negatively in *Rustad*; Judson J. voted negatively in *Cowan, supra*, footnotes 194 to 198.

²⁰³ Both voted negatively in *More, Brown, Cowan, Silvestro, Coté, Laroche, George and Salamon*. Taschereau C.J. also voted negatively in *Colpitts*; Fauteux J. also voted negatively in *Workman and Huculak, supra*, footnotes 194 to 198.

²⁰⁴ *The Queen v. Topechka* (60-898), and *The Queen v. Toupin* (65-275), *supra*, footnote 181 (s. 170(2)(b)(i) of the Criminal Code defining "slot machine"); *The Queen v. Kerim* (63-124), *supra*, footnote 181 (an owner who permits his premises to be used for the playing of games, but does not participate in the operation of the games, is not guilty of "keeping" a common gaming house under s. 176(1) of the Criminal Code); *Colpitts v. The Queen* (65-739), *supra*, footnote 181 (if there was an error in law at the trial, an appellate court may not dismiss the appeal on the ground that "no substantial wrong or miscarriage of justice has occurred" within the meaning of s. 592(1)(b)(iii) of the Criminal Code, unless the Crown satisfies the court that the verdict of guilty would necessarily have been the same if the error had not occurred). The court considered, too, the validity of the trial judge's charge, see, *supra*, footnote 194; *The Queen v. Cumming* (62-507), *supra*, footnote 182 (the theft of money from envelopes prepared by a post office investigator and mingled with the mail for the sole purpose of testing the honesty of the accused post office employee was held to be the theft of something "sent by post, after it is deposited at a post office and before it is delivered" within the meaning of s. 298(1)(a)(i) of the Criminal Code); *The Queen v. George* (66-267),

²⁰⁵ See next page.

which he participated, and Spence J. in his single participation.²⁰⁴ Abbott, Judson and Fauteux JJ. voted negatively in all appeals in this category in which they participated (three, four and five appeals, respectively).²⁰⁷ Hall J. voted negatively in two of the three such appeals which he heard, casting his only negative votes on the C scale.²⁰⁶ Ritchie J. voted affirmatively in three participations out of five,²⁰⁹ and Martland J. in three of four.²¹⁰ Taschereau C.J. voted affirmatively in two of the six appeals he heard. The two affirmative votes constitute two of his four inconsistent votes on the scale.²¹¹

There are eight appeals on the C scale in which the primary question was whether the court had jurisdiction to hear the appeal. In five appeals, the court considered whether an appeal was based on a question of law, so as to be within the jurisdiction conferred by sections 597 and 598 of the Criminal Code;²¹² in two appeals, the court considered its jurisdiction to hear an appeal against sentence;²¹³ in one appeal, the court considered its jurisdiction under section 41 of the Supreme Court Act.²¹⁴

supra, footnote 190 (The Indian Act, R.S.C., 1952, c. 149, s. 87 does not render inapplicable to Indians the Migratory Birds Convention Act, *supra*, footnote 190, notwithstanding that the latter Act is inconsistent with Indian treaties); *Dennis v. The Queen* (58-473), *supra*, footnote 185 (the meaning of "respondent" in s. 722(1)(b)(ii) of the Criminal Code).

²⁰⁵ *Kerim, Colpitts, Cumming, Toupin, George, supra*, footnote 204.

²⁰⁶ *Colpitts, ibid.*

²⁰⁷ Abbott J.: *Colpitts, Toupin, George*; Judson J.: *Topechka, Colpitts, Cumming, George*; Fauteux J.: *Topechka, Dennis, Cumming, Toupin, George, ibid.*

²⁰⁸ *Toupin and George*; he voted affirmatively in *Colpitts, ibid.*

²⁰⁹ Affirmative in *Topechka, Kerim, Colpitts*; negative in *Cumming, George, ibid.*

²¹⁰ Affirmative in *Topechka, Kerim, Dennis*; negative in *George, ibid.*

²¹¹ Affirmative in *Topechka, Cumming*; negative in *Kerim, Colpitts, Dennis, Toupin, ibid.*

²¹² *The Queen v. Warner* (61-144), *supra*, footnote 180 (the majority held that if the appellate court gives two reasons for its decision, one raising a question of law and the other raising a question of fact or mixed fact and law, an appeal does not lie to the Supreme Court); *The Queen v. Lemire* (65-174), *supra*, footnote 183, and *The Queen v. Taylor* (63-491), *supra*, footnote 180 (whether the appeal was based on a question of law; whether *The Queen v. Warner, supra*, applied); *Brown v. The Queen*, and *The Queen v. Toupin* (65-275) (whether the dissent below was based on a question of law).

²¹³ *Goldhar v. The Queen* (60-60), *supra*, footnote 187 (Criminal Code s. 597 held not to confer jurisdiction to hear an appeal against sentence based on a question of law); *The Queen v. MacDonald* (65-831), *supra*, footnote 184 (the court has no jurisdiction to hear an appeal from a judgment setting aside a sentence of preventive detention).

²¹⁴ *Paul v. The Queen* (60-452), *supra*, footnote 185 (the court has no jurisdiction to hear an appeal from the order of a County Court judge dismissing an appeal from a magistrate for want of jurisdiction; or an appeal from the order of a Court of Appeal refusing leave to appeal from

Cartwright J. voted affirmatively in all eight jurisdictional appeals. In the five jurisdictional appeals brought by the Crown, he held that the Supreme Court had no jurisdiction to hear the appeal,²¹⁵ and in the three jurisdictional appeals brought by the accused he held that the court had jurisdiction.²¹⁶ Mr. Justice Fauteux voted negatively in all appeals involving jurisdiction in which he participated, holding that the court had jurisdiction to hear four appeals brought by the Crown,²¹⁷ and no jurisdiction to hear three appeals brought by the accused.²¹⁸ Mr. Justice Martland held that the court had jurisdiction to hear the five appeals in this group in which he participated, three being appeals by the Crown,²¹⁹ and two, appeals by the accused.²²⁰

In the three appeals considering the special pleas of *res judicata*, *autrefois acquit* and inconsistent verdicts,²²¹ Cartwright and Hall JJ. voted affirmatively in the cases in which they participated.²²² All other justices voted negatively in all cases in which they participated, other than Ritchie J., who voted affirmatively in one of the two appeals which he heard.²²³

In the four appeals considering allegations of procedural defects,²²⁴ Cartwright J. voted affirmatively in the three appeals in which he participated,²²⁵ as did Martland J. in the two appeals in

such order of the County Court). The Supreme Court Act, R.S.C., 1952, c. 259, s. 41.

²¹⁵ *MacDonald, Warner, Lemire, Taylor, Toupin, supra*, footnotes 212 to 214.

²¹⁶ *Brown, Goldhar, Paul, supra*, footnotes 213, 214.

²¹⁷ *Warner, Lemire, Taylor, Toupin, supra*, footnotes 212, 213.

²¹⁸ *Brown, Goldhar, Paul, supra*, footnotes 213, 214.

²¹⁹ *MacDonald, Warner and Lemire, supra*, footnotes 212, 213. Mr. Justice Martland's two inconsistent negative votes were cast in *MacDonald* and *Warner*.

²²⁰ *Brown, Paul, supra*, footnote 214.

²²¹ *Wright, McDermott and Feeley v. The Queen* (63-539), *supra*, footnote 186 (*autrefois acquit* and *res judicata*); *Koury v. The Queen* (64-212), *supra*, footnote 183 (inconsistent verdicts); *MacDonald v. The Queen* (60-186), *supra*, footnote 187 (*res judicata*).

²²² Cartwright J. participated in the three appeals; Hall J., in *Wright* and *Koury, supra*, footnote 221.

²²³ Affirmatively in *Koury*; negatively in *MacDonald, ibid*.

²²⁴ *Kipp v. A.-G. Ontario* (65-57), *supra*, footnote 188 (whether indictment charging the sale of "dead animals" defined as either animals not properly killed or diseased animals under The Food and Drugs Act, S.C., 1952-53, c. 38, s. 25(b) is void for duplicity); *Gordon v. The Queen* (65-312), *supra*, footnote 184 (whether notice of application for a sentence of preventive detention "in addition to" rather than "in lieu of" the sentence imposed for a substantive offence is valid); *Paul v. The Queen* (60-452), *supra*, footnote 185 (whether notice of appeal against conviction of a summary conviction offence raises adequate grounds); *Dennis v. The Queen* (58-473), *supra*, footnote 185 (whether notice of appeal against conviction of a summary conviction offence was properly served).

²²⁵ *Paul, Kipp and Gordon, supra*, footnote 224.

which he participated.²²⁶ Taschereau C.J., and Fauteux and Judson JJ. voted negatively in all the appeals of this sort in which they participated.²²⁷

Ritchie J., with a voting division of twelve affirmative and ten negative votes, is the only justice whose voting pattern is neutral as between the Crown and the accused. He voted affirmatively in five of the six homicide appeals in which he participated,²²⁸ and negatively in the three appeals in connection with theft and robbery;²²⁹ he voted affirmatively in two of the three betting house appeals²³⁰ and in two of the three fraud and forgery appeals in which he participated.²³¹ In the jurisdictional appeals in which he participated, he held that the court had jurisdiction to hear one of the two appeals brought by the accused²³² and one of the three appeals brought by the Crown.²³³

Conclusion

As I indicated above, my purpose in this article is to present a report of an initial effort to apply a behavioural method to the work of the Supreme Court of Canada. I have used only one such method, scalogram analysis, and I have applied it to a relatively small number of decisions. Bearing in mind these limitations in scope, I shall not attempt to anticipate the broad conclusions about the nature of decision-making by the court, which may be warranted after further work has been done. I wish to conclude this report by drawing together some of the findings that emerge from the separate examinations of taxation, negligence and criminal law decisions.

The scalogram of each group of cases indicates that some justices consistently uphold or oppose the claims of the taxpayer in taxation appeals, the plaintiffs in negligence appeals, or the

²²⁶ *Paul and Dennis, ibid.*

²²⁷ Taschereau C.J. the four cases: Judson J.—*Paul, Kipp and Gordon*; Fauteux J.—*Paul, Dennis, Gordon, ibid.*

²²⁸ *Rustad* (65-555); *More* (63-522); *Warner* (61-144); *Colpitts* (65-739); *Workman and Huculak* (63-266); he voted negatively in *Coté* (64-358), *supra*, footnote 180.

²²⁹ *Cumming* (62-507); *Laroche* (64-667); *George* (60-871), *supra*, footnote 182.

²³⁰ Affirmatively in *Topechka* (60-898); *Kerim* (63-124); and negatively in *Silvestro* (65-155), *supra*, footnote 181.

²³¹ Affirmatively in *Cowan* (62-476); *Koury* (64-212); and negatively in *Lemire* (65-174), *supra*, footnote 183.

²³² *Paul* (jurisdiction) (60-452); *Goldhar* (no jurisdiction) (60-60), *supra*, footnotes 213, 214.

²³³ *Lemire* (jurisdiction) (65-174); *MacDonald* (65-831), and *Warner* (no jurisdiction) (61-144), *supra*, footnotes 212, 213.

accused in criminal appeals. As the appeals on each scale raise a wide variety of legal issues, it is reasonable to hypothesize that such justices (who appear near the left or right sides of the scales and have voting patterns classified as "highly pro" or "pro") base their decisions, at least in part, on the value or policy issue raised by the appeals on each scale.²³⁴ An examination of the three scalograms, taken together, indicates that some justices tend to have one-sided voting patterns on more than one scale. This suggests the hypothesis that these justices pursue policy goals in more than one area of the law.

The voting patterns described on each scalogram for each justice may be conveniently represented by indicating the position of each justice on a profile line, divided into five segments to represent the five categories of highly pro-affirmative, pro-affirmative, neutral, pro-negative and highly pro-negative. The rankings of the justices on the profile lines differ somewhat from those on the scales, as they are based not on scale score alone, but on voting patterns classified according to both scale score and voting division.²³⁵

	Highly pro- affirmative	Pro- affirmative	Neutral	Pro- negative	Highly pro- negative
Taxation		C	T R S M H	A F	J
Negligence	H	S C T	J M F R	A	
Criminal	C	H S	R	M A	J T F

The two justices who appear most frequently near the extremes of the profile lines are Mr. Justice Cartwright and Mr. Justice Abbott. Mr. Justice Cartwright appears near the left side of each of the three lines. His voting pattern is in favour of the taxpayer in taxation appeals and of the plaintiff in negligence appeals, and highly in favour of the accused in criminal appeals. Accordingly, he supports the individual or business organization in disputes with government (criminal law and taxation cases), and the in-

²³⁴ See *supra*, footnote 18.

²³⁵ Kerwin C.J. and Rand and Locke J.J. have been omitted.

The order in which the judges appear on the scales has been retained on the profile lines, except where a justice's voting pattern is characterized differently by his scale score and voting division.

dividual in disputes with business organizations (the negligence appeals, in which, in effect, plaintiffs assert claims against insurers). The effect of the voting patterns in negligence and taxation cases is to promote the wide distribution of the cost of normal risks through non-government techniques such as insurance, but to inhibit the satisfaction of government revenue demands necessary for the expansion of government services.

Mr. Justice Abbott's positions on the profile lines contrast with those of Mr. Justice Cartwright, as he appears near the right side of the three lines. His voting pattern is in favour of the government in taxation appeals, of the defendant in negligence appeals and of the Crown in criminal law appeals. His voting pattern which is never in the "highly pro" category, does not place him at the extreme right side of the taxation or criminal law profile lines, but does place him at the extreme right side of the negligence line. The effect of his votes in negligence and taxation appeals appears to be to promote the satisfaction of government revenue demands, making possible the expansion of government services, but to inhibit the wide distribution of the costs of normal risks by way of private insurance. With respect to his support of government in taxation and criminal law appeals, it should be remembered that he was a member of the federal cabinet for many years.

Mr. Justices Hall and Spence resemble Mr. Justice Cartwright in their support of plaintiffs' claims for compensation in negligence cases and their support of the accused in criminal cases. However, the voting patterns of both are neutral as between taxpayer and government.

The voting patterns described for Mr. Justices Judson and Fauteux have similar characteristics. Both support the government in taxation and in criminal law appeals, and in these respects their voting patterns resemble that of Mr. Justice Abbott. Mr. Justice Judson, whose voting pattern is highly in favour of the Crown in both taxation and criminal law appeals, is the only justice whose voting pattern is classified as "highly pro" on two scales. Both Judson and Fauteux JJ. are neutral as between plaintiffs and defendants in negligence appeals. However, both have anomalous voting patterns in those appeals. Mr. Justice Fauteux's voting pattern on the N scale is classified as pro-defendant on the basis of his scale score. Mr. Justice Judson's voting pattern suggests a pro-plaintiff tendency in negligence appeals.

Chief Justice Taschereau shows mild support for plaintiffs' claims for compensation in negligence appeals. Although he

appears as a neutral in taxation appeals, his voting division shows a tendency to support the taxpayer as against the government. The effect of the voting pattern appears to be to favour compensation for injuries in negligence cases through private means, and not to support government claims for revenue, necessary for expansion of government services. In criminal law appeals he is highly in favour of the Crown.

Taschereau C.J. and Fauteux J., the two French-Canadian justices on the court, exhibit quite different voting patterns in taxation and negligence appeals, Chief Justice Taschereau favouring the taxpayer and the plaintiff to a considerably greater extent than Mr. Justice Fauteux. In criminal law appeals, their voting patterns are similar.

Mr. Justices Ritchie and Martland are the most neutral justices on the three scales. Mr. Justice Ritchie's voting pattern is neutral in taxation, negligence and criminal law appeals. Mr. Justice Martland's voting pattern is neutral in taxation and negligence appeals and pro-Crown in criminal law appeals.
