

## **Economic Cases and the Attitudinal Model in the Canadian Supreme Court**

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## **Introduction**

For several decades judicial scholars have explored the extent to which disagreement between Supreme Court justices in the economic area reflect differences of opinion along a liberal-conservative continuum. This question has been particularly prominent in the U.S. literature and has fostered much debate. Despite early answers from pioneers of attitudinal research such as Schubert (1965, 1974), the degree to which traditional notions of liberalism impact decisions in the economic area remains unclear (see Dudley and Ducat 1986; Ducat and Dudley 1987; Hagle and Spaeth 1992, 1993). More importantly, scholars have yet to examine the interplay between case facts and ideology in economic disputes. This study seeks to explore these questions in a comparative Canadian context, because it will help answer if facts are relevant in economic disputes, and also further demonstrate the relative importance of the attitudinal model beyond the confines of the United States. Building on earlier research by Peck (1969) and Fouts (1969) this study constructs a comprehensive model that explores the relationship between ideology, case facts, norms of judicial deference, and social background factors in post-Charter economic disputes.

## **Literature Review**

In the 1960s, scholars began to systematically analyze the impact ideology has on the voting behavior of judges. The seminal work by Schubert (1965, 1974) used both factor analysis and cumulative scaling techniques to develop a psychometric model that placed judicial attitudes along a civil liberties and economic liberalism continuum. These ideological scores, often called the "C-scale" and "E-scale," explained much of the variance in judicial voting on the Vinson and Warren Courts (1946-63) and have served as a hallmark for a plethora of subsequent studies.

Building on the work of Schubert, Rohde and Spaeth (1976) illustrated the need to also study the dominant legal issues along with the parties involved in the dispute in order to assess attitudinal conflict on the court. In economic cases, they found that Warren and Burger Court justices were predisposed to favor certain parties (for example unions and economic underdogs) and to consistently support certain outcomes pertaining to the dominant legal issues appearing in the dispute (for example government's power to tax; see Rohde and Spaeth 1976, 77, 138).

While some have criticized the "Schubertian" approach for circular reasoning, others, such as Ducat and Dudley (1987; Dudley and Ducat 1986), have criticized the tendency to prejudge the attitudinal direction of judicial votes when utilizing scalogram analysis (see also Flango and Ducat 1977). As such, they relied on exploratory factor analysis and a detailed reading of the cases to uncover the attitudinal dimensions underlying economic disputes in the early and late Burger Court (Ducat and Dudley 1987). They found that while economic liberalism/conservatism was the most prominent dimension in the early Burger Court (ahead of judicial deference to administrative agencies and attitudes toward business interests), by the late Burger Court, the traditional notions of liberalism were only secondary to federalism concerns (Ducat and Dudley 1987). However, scholarship by Hagle and Spaeth (1992, 1993), found that along with other key legal features, economic "instrumental libertarianism" or "support for business autonomy" was one of the most important factors of the Burger and Rehnquist Court's economic decisions. While disagreements have emerged over the relative impact that ideology has on judicial votes, it is clear that an overarching component of economic liberalism and conservatism remained salient for explaining conflict among U.S. Supreme Court justices well into the 1990s.

Recent research by Segal (1984, 1986) and Segal and Spaeth (1993, 2002) has begun to explore the impact of attitudes toward case facts, in addition to ideology, in multivariate models of judicial decision-making. Despite the fact that they have been able to explain a great deal of the variance in a sub-set of criminal case votes by U.S. Supreme Court justices, they point out that few researchers have studied the interplay of facts and ideology in other legal areas (Segal and Spaeth 1993, 221; 2002, 319). "Outside of search and seizure, only a handful of other subjects have successfully been put to such a test. Whether facts cause the justices to vote as they do in areas such as ... state taxation ... and so on has not been determined. Furthermore, certain justices in certain areas may deem facts irrelevant" (Segal and Spaeth 1993, 221; 2002, 319). Taking Segal and Spaeth's charge seriously, this study seeks to explore the applicability of the attitudinal model on two new fronts: 1) its relevance for explaining judicial conflict in tax and union cases (two areas never before tested); and 2) its success in explaining conflict in another high court (Canada) that exhibits many of the same structural and operational characteristics as the U.S. Supreme Court. The importance of the study lies in the fact that it not only assesses whether Canadian justices deem facts relevant in resolving important economic cases, but it also offers American scholars further proof that incorporating case facts into the attitudinal model has applicability beyond the confines of the U.S., and thus may constitute a viable global model for explaining judicial behavior on courts of last resort in numerous areas of law.

The addition of the Charter of Rights and Freedoms to the Canadian Constitution in 1982 prompted a wave of studies examining its impact on Canadian jurisprudence, patterns of judicial activism, and institutional power struggles over the document's meaning (see Manfredi 1993, 2001; Knopf and Morton 1992; Morton and Knopf 2000, Greene et al, 1998; McCormick 1994,

2000; Monahan 1987; Hiebert 1996, 2002; Roach 2001; Russell 1992; Hogg and Bushnell 1997; Manfredi and Kelly 1999; Morton, Russell, and Withey 1991; Morton, Russell and Riddell 1994; and Brodie 1992). It also sparked a new interest by comparative judicial scholars in assessing the applicability of American models of judicial behavior in the Canadian context (see Tate and Sittiwong 1989, Songer and Johnson 2002; Flemming and Krutz 2002a, 2002b; Wetstein and Ostberg 1999; and Epp 1996, 1998). Despite this growing interest in the Canadian Supreme Court, no research to date has tested a multivariate model examining the interface between facts and judicial ideology in the economic area.<sup>1</sup> The question remains, to what degree, if any, does the attitudinal model help account for the conflict in the post-Charter economic cases?

### **Data and Methods**

Mindful of the earlier work of Schubert and others, our test of the attitudinal model starts from the presumption that most Canadian economic cases pit liberty interests against notions of economic equality. In short, they often present conflicts between corporate interests (pursuing their "liberty" to maximize profits) and those representing the economic underdogs in society (who seek to redress economic inequality at the hands of corporate elites). When government gets involved in an economic dispute, it seems to represent the interest of ensuring that market forces do not unduly harm consumers and that minimum standards of living are maintained. As such, government can be seen as protecting the have-nots or societal underdogs through its regulatory power and its authority to generate revenue for government programs. Since tax and union cases comprise the largest percentage of nonunanimous rulings in the post-Charter economic area, they provide fertile ground for examining the tension between notions of economic liberty and equality. In short, we examine economic liberalism in the context of a

more complex model of judicial behavior that controls for case facts, judicial deference, and social background measures (see Gibson 1983). We posit that when disagreements emerge on the Canadian Supreme Court, that one or more of these variables account for that disagreement. If Segal and Spaeth's (1993, 2001) model is applicable abroad, there should be disagreement among members of the Canadian Court over the relative importance of various factual scenarios. If not, indicators tapping factual circumstances will not prove statistically significant in the equation. Regardless, this is an important test to conduct to assess the cross-cultural staying power of one of the most prominent models of judicial behavior in the U.S. literature.

### *Union Cases*

The data for this paper are derived from non-unanimous decisions published in the Supreme Court Reports in the post-Charter period (1984-2002). Specifically, the cases analyzed are drawn from business law disputes featuring union-management conflicts and tax disagreements. Cases were included in the union area if a labour issue was the central component of the case, with each justice's vote used as the unit of analysis (N = 208).<sup>2</sup> Since we were interested in examining whether ideology influences the voting behavior of Canadian Supreme Court justices, the dependent variable is a dichotomous measure reflecting whether a justice supported a union claim in the case, or management or state interests. Votes were determined to be liberal, and coded with a 1, if the justice sided with the union in the case. In these cases the union was perceived as the economic underdog because they personify individuals' efforts to secure better working conditions and compensation from employers. Votes were coded as zero if they endorsed the economic interests of employers. The coding scheme utilized here follows a well-established pattern of research on economic votes by U.S. Supreme Court justices (Schubert 1965, 1974; Spaeth 1963; Hagle and Spaeth 1992, 1993).

There were a total of fourteen independent variables included in our analysis that tested the impact of ideology, prominent background characteristics, judicial deference, and fact patterns on judicial voting behavior. One of the obvious factors that might influence a justice's support or opposition to union claims is whether the justice has an identifiable ideological predisposition to such disputes. One measure of ideology utilized in this study was the party identification of a justice, inferred from the party of the Prime Minister who made the appointment (Liberal appointees = 1, Progressive Conservative appointees = 0). Although this is a crude measure of ideology, it has been used by a host of scholars in the U.S., and has proven to be a powerful predictor of judicial voting patterns (Tate 1981). Likewise, scholars of the Canadian Supreme Court are increasingly turning to this measure as a predictor of voting behavior in the civil rights and liberties area (Tate and Sittiwong 1989; Songer and Johnson 2002; Wetstein and Ostberg 1999). In line with our theoretical expectations, we expect that Liberal Party appointees will be more prone to favor the economic interests of unions in labour disputes, because they will be more predisposed towards favoring the "have-nots" or underdogs in society in securing economic equality claims. In contrast, conservatives will be more likely to align themselves with the economic liberty claims of employers and economic elites.

A second measure of ideology used in the study is based on prior research by Segal and Cover (1989) that looked at newspaper editorials as a surrogate indicator of a justice's ideological leanings. In this study, we analyzed the content of newspaper reports regarding Supreme Court nominees in the *Toronto Globe and Mail* to determine if outside commentary regarding a prospective justice's ideological views is a viable indicator of judicial ideology (see Cameron, Cover, and Segal 1990; Segal and Spaeth 1993, 2001; Ostberg and Wetstein 1998). The coding scheme for this measure is a five-point scale ranging from +2 to -2, based on

references to ideology and political party ties in the newspaper coverage. A score of +2 or +1 represented an "extreme liberal/liberal" or "moderate liberal/leaning liberal" nominee respectively, while a score of -2 or -1 reflected an "extreme conservative/conservative" or "moderate conservative/leaning conservative." Justices receiving a zero score were either identified as moderates or represented cases where the newspaper commentary did not identify any ideological proclivities on the part of the justices.<sup>3</sup> We anticipate that justices scoring higher on this measure will be more likely to vote liberally in economic disputes because they are more sympathetic to the claims of the common workers, while conservative will be more prone to align with the economic concerns of employers.

We analyzed the influence of two judicial background characteristics that we thought would be particularly salient in economic cases, namely private legal practice and gender. Private practice is a measure that taps whether a justice spent the bulk of his/her career as an attorney in private practice. As such, justices who fell into this category, and came to the court with less than five years of judicial experience were scored as a 1 on this dichotomous variable (1 = private practice). Justices with five or more years of judicial experience, who worked principally as academics, judges or politicians, were scored as a zero. It is hypothesized that justices who arrive on the court having served a bulk of their career as private attorneys will tend to favor corporate interests more than other judges. Since most of these justices have worked for top law firms representing leading corporate interests in Canada, it is believed they are more likely to support the economic libertarian claims made by corporate parties. Gender, on the other hand, assesses whether female justices on the Court approach economic cases "in a different voice" than their male counterparts (Gilligan 1982). Female justices received a code of 1 on this dichotomous indicator. It is hypothesized that female justices will tend to vote more liberally on

union-management cases because we believe they have a greater propensity to identify with individuals and groups who are seeking economic equality claims and have been persistent underdogs in the workforce. However, it is important to note that recent scholarship by Songer and Johnson (2002) seems to suggest that there is no statistically significant difference between male and female justices in economic cases studied between 1980 and 2000.

The analysis includes an important control variable accounting for the possibility of judicial deference to the expertise of labour boards that play a key role in resolving labour-management conflicts in Canada. If there was liberal ruling by a Labour Board in the early stages of the dispute, we coded the case as a +1, while a conservative ruling by a Labour Board was coded as -1. The rationale here is that since labour boards have been established to adjudicate union-management conflicts, and have necessarily developed specialized expertise for resolving these cases, justices may be more likely to defer to their rulings. Moreover, an argument could be made that if justices simply substituted their views for the rulings of these specialized adjudicatory bodies, the primary rationale for these bodies is undermined.

Ten factual circumstances typical in Canadian labour cases were included in the analysis in order to control for the fact patterns that might trigger attitudinal disagreement amongst the justices. Specifically, facts were coded as dichotomous variables with a value of one if a specific fact pattern occurred in a dispute, while a value of zero was entered in all other circumstances. Our understanding of the importance of factual variables stems from the work of Segal (1984; 1986) and Segal and Spaeth (1993; 2001), who demonstrated that fact patterns played an important role in explaining the voting behavior of U.S. Supreme Court justices in the search and seizure area. Our coding of the facts in Canadian cases is drawn from the Supreme Court opinions, and is based on the belief that the justices treat the factual record in an accurate

manner, and frequently turn to the lower court record to recount a summary of the facts in the current case before the court. As such, we believe that the dependent variable (the case vote) necessarily comes as a response to the facts of a case, and not vice versa.

The first factual circumstance included in the model is whether the dispute involved blue-collar workers (scored as a 1) as opposed to white-collar workers (scored as a 0). It is hypothesized that, controlling for all other factors, justices will favor blue-collar workers more than their white-collar counterparts because they more readily represent the economic underdogs in society. Since blue-collar workers are less privileged, face more difficult working conditions, and fewer job opportunities, we believe justices will deem them more worthy of protections from economic harm than other workers. In essence, even when controlling for judicial ideology, justices will be more supportive of those who are most vulnerable to the whims of the marketplace.

A second set of factual variables pertains to cases involving some form of inequitable treatment of workers by management. These cases included instances of unfair bargaining by management, "contracting-out" disputes, incidents of wrongful dismissal of employees, and discrimination and harassment cases. Disputes that featured companies engaging in unfair labour practices were coded with a 1, while all other cases were scored as a 0. It is hypothesized that when companies engage in foul play at the bargaining table, justices are more likely to favor the economic claims of unions because management has not "played by the rules." In cases where companies attempt to contract-out employment to non-union workers (contract-out = 1, all other cases = 0), we believe justices will also be more sympathetic to unions because management appears to be abandoning the negotiation process with workers in an effort to secure cheaper labour. In essence, when controlling for all other factors, justices are more likely

to endorse the economic equality interests of union workers when companies are seen to be violating appropriate labour-management bargaining practices. Similarly, it is perceived that in disputes involving the wrongful dismissal of employees (wrongful dismissal = 1, all other cases = 0), justices will be predisposed to favor the worker because he/she has been unfairly treated at the hands of management. Lastly, it is believed that justices will support the individual in disputes featuring sexual harassment claims or some form of discrimination (harassment/discrimination = 1, all other cases = 0). The logic here is that justices will be inclined to favor the party who has endured discriminatory treatment in an effort to secure economic equality in the workforce and maintain a fair environment for all.

Another set of factual variables includes whether there was a strike or employee lockout in the case, or whether employees were pursuing a right to strike claim in the courts. In cases involving a work stoppage (1 = strike/lockout, 0 = all other cases), we hypothesize justices will tend to favor employees who have engaged in legitimate strike activities or faced a lockout situation because the workers are prone to face severe economic hardship during such an impasse. The fact that employees who strike must take such extreme measures to register their dissatisfaction with wages and working conditions illustrates the severity of the conflict, and may predispose the justices to favor the economic equality claims of the underclass.<sup>4</sup> Thus, as long as unions advance legitimate economic reasons for a strike, we hypothesize that justices will lean towards the have-nots in society, even when controlling for other factors like ideology. On the other hand, in cases where unions seek to secure a constitutional right-to-strike under the Charter, despite existing statutes forbidding such employee strikes, justices are likely to reject the claim in favor of the liberty interests of corporations. In essence, justices will perceive unions as pushing the legal envelope by trying to secure a constitutional right that cannot be

found in the text of the Charter. In addition, justices may fear that if such a right were read into the Charter, a power imbalance would result because unions could simply bypass the negotiations process and use the threat of a strike to achieve their demands. The coding scheme for this variable was a 1 if unions were seeking a right-to-strike under the Charter, and a 0 in all other cases.

The last set of factual variables revolved around disputes involving unemployment benefits, sick leave/disability claims, and pension benefits. All three types of benefit claims were coded as dichotomous variables if they appeared in a case (1 = benefit dispute, 0 = all other cases). In one sense, a worker's effort to secure benefits while out of work can be seen as falling into a hierarchy of need pertaining to a worker's current and future economic survival. Viewed from this hierarchy, unemployment benefits are most critical for a worker because they are essential to meeting basic daily needs of obtaining food and shelter in the face of job-loss. As such, we hypothesize that justices will tend to perceive denial of unemployment claims as most egregious to the current economic needs of a worker. Disputes over sick leave and worker compensation benefits are second in the hierarchy because in most of these cases workers are still gainfully employed, but are only temporarily indisposed due to illness or disability. Thus, justices are *less* favorable to these types of claims when compared to unemployment disputes, but are *more* favorable to workers in these cases than those involving pension benefits. Claims seeking the protection of pension benefits are found at the bottom of the economic hierarchy because they involve future monetary remuneration. Consequently, these claims are seeking economic security at some point down the road, rather than during a current economic crisis. We omit cases involving pension benefits from our analysis in order to have a category that we can use to compare with the coefficients for the two other benefit variables. We expect that the

coefficients will be positive and highest for unemployment benefit cases, followed by a positive, but lower coefficient for sick leave and workers compensation.

### ***Tax Cases***

The cases included in the tax area are derived from non-unanimous decisions published in the *Supreme Court Reports* (1984-2002) that addressed tax disputes between government and individuals or corporations. Like the union area, each justice's vote served as the unit of analysis, with liberal votes coded as a 1 whenever a justice endorsed the government's power to tax, and conservative votes coded as 0 when individual or corporate interests prevailed (N = 134 votes).<sup>5</sup> The rationale behind this coding scheme is that government procures taxes to ensure that a variety of public goods and services are provided to citizens, and to ensure a social safety net exists for those who are economically disadvantaged. Thus, a liberal vote would favor government's power to deliver more of these services through taxation, while a conservative vote would lean toward the economic liberty claims of individual taxpayers and companies who seek to protect their resources to pursue their own economic goals.

Five of the independent variables used in the analysis of tax votes mirrored the ideology, background characteristics, and judicial deference measures used in the union-management disputes (described above). The judicial deference measure is slightly different in that a liberal trial court ruling was scored as a +1, while a conservative ruling was scored as a 0. In line with the union hypothesis, we believe Canadian Supreme Court justices will be more prone to defer to trial court judges in tax cases because they have more expertise in resolving such claims -- at least at the federal level. For the remaining four variables, namely Party of Prime Minister, newspaper ideology, private practice, and gender, the coding scheme was identical to that found in the union area, although the hypotheses were recast with a tax focus.

Naturally, Liberal Party appointees will be more favorable than conservatives to the tax claims of government over individual/corporate interests in order to secure the provision of public goods and address the income inequalities felt by the most disadvantaged members of society. In similar fashion, we expect that justices scoring higher on the newspaper liberalism score will be more prone to support the taxation power of government than their conservative counterparts. In contrast, justices who served a bulk of their career in private practice are more likely to favor the economic liberty claims made by individuals and companies who seek to secure their profits from excessive taxation. It is hypothesized that in the taxation area, women will more likely favor the government's power to tax because women and children are disproportionately found at the lower ends of the socio-economic spectrum. Consequently, we believe female justices are more likely to see the need to redistribute wealth through taxation, and that they have greater empathy for those who are discriminated against and constitute the economic underclass.

One variable unique to the tax cases is an indicator of whether the national government was aligned against a corporate interest in the tax dispute. It was anticipated that justices would be more prone to favor the national government's power to tax corporations, over federal efforts to tax individuals, or provincial efforts to tax companies and individuals. The logic behind this hypothesis stems in part from a belief that even in a federal system, where provinces exert independent control over some governmental functions, the national government has premiere power to secure funds from taxpayers in order to provide public goods and services for the nation as a whole. Indeed, Canada's history of taxing authority since its confederation recognizes a national supremacy in the collection of taxes, with the provinces dependent upon tax collections and abatements that are directed by the national government to this day (see Hogg 1997, 143-52). Moreover, one might argue that from a psychological perspective, justices would be less

likely to sympathize with corporate entities than individual taxpayers in the face of federal taxation power because corporations are a product of wealthy and powerful interests and thus, are more able to "weather the storm" of government taxing authority than individual citizens. Given these arguments, it is hypothesized that justices will be more favorable toward the federal taxing power in cases involving corporate entities than in all other cases. Our coding scheme for this variable was a 1 if the national government was pitted against a corporation, while all other cases were coded as 0.

Another salient factual variable that is noteworthy in the taxation area pertains to bankruptcy cases. A number of disputes in the post-Charter period address government efforts to demand priority standing over all other creditors in bankruptcy claims. Whenever this fact appeared in a case, we coded the case with a 1, while all other cases were scored as a 0. It is hypothesized that justices will be less likely favor governmental priority claims in bankruptcy proceedings because we believe they will tend to view both private and governmental creditors on an equal basis. Indeed, if governments were given priority in such cases, private creditors and banks would be less willing to lend money and invest in economic enterprises given the increased economic risk in the event of a bankruptcy. A potential counterargument to this hypothesis is the notion that justices might believe government should have priority in bankruptcy cases simply because it has a paramount interest in securing timely payment of debts to the public treasury as a representative of taxpayers who pay into it, and in the interest of providing public goods and services to society. Although plausible, we do not think this counterargument is as convincing because we believe the justices are more prone to treat people who are owed money on an equal footing, rather than ensuring the primacy of government in the collection of debts.

The last salient factual variable in tax cases pertains to the type of tax involved in the dispute. Cases in the tax area fell into three categories, which included income tax disputes dealing principally with deductions, stock/estate taxes, and sales taxes. All of these categories were coded as dichotomous variables, with a score of 1 if the type of tax existed in the dispute, and a 0 if not. We established a hierarchy for the types of tax claims that parallels the one utilized in the union benefits area. At the top of the hierarchy, one could see governmental demands for income taxes as the most immediately intrusive type of tax for individuals and companies because it affects their ability to meet their short-term economic goals. Income taxes have an impact that is more noticeable from pay period to pay period than other forms of taxes. In this regard, justices are hypothesized to be most favorable to the economic liberty interests of taxpayers when they dispute government income taxes or income tax deductions that have been disallowed by government. Stock and estate taxes are seen as falling second on the tax hierarchy, with their impact being perceived as less central to the current economic survival of individuals, but still intrusive because they tend to be imposed in higher magnitudes and have ramifications for surviving dependents. As such, we anticipate justices will be *less* favorable to the interests of taxpayers in these cases when compared to income tax disputes, but still *more* favorable to their claims than in sales tax circumstances. We omit sales tax cases from our analysis in order to have a comparison category for the other two forms of taxes. Because of the almost invisible nature of sales taxes for most people in their daily lives, we believe the justices will treat individual challenges to these taxes least favorably. In terms of coefficient size, we expect the largest negative coefficient for income tax cases, and a slightly smaller but still negative coefficient for stock/estate taxes.

## **Results**

### *Union Case Results*

Logistic regression analysis is applied to the data because of the dichotomous nature of the dependent variables (Aldrich and Nelson 1984). Table 1 provides the maximum likelihood estimates for the cases involving union-management conflicts, along with model fit statistics that are found at the bottom of the table. The results reflect the relative impact of the ideological, background, judicial deference, and factual variables in the model. We have created two separate models of the equation because of the high degree of collinearity that exists between the newspaper ideology measure and the background indicator of private practice.<sup>6</sup> This discovery led us to conclude that private legal practice serves as a viable proxy for measuring the ideological predispositions of justices in the realm of nonunanimous economic cases in the post-Charter era. This seems plausible given that justices who ascend to the highest court from a long tenure of service in the private legal sector tend to have a closer affinity to conservative economic interests of the corporate elite (for a similar hypothesis see Tate and Sittiwong 1989: 906). Our findings appear to confirm this connection, which stands in contrast to earlier scholarship by Tate and Sittiwong (1989), perhaps because they principally focused on pre-Charter decisions (Songer and Johnson 2002). As a result, we include two separate models: the first which features the highly collinear measures of newspaper liberalism and private practice, while the second includes the private practice measure because it had a statistically significant impact in the original model.

Turning to model one (the left column of Table 1), the modal frequency for the dependant variable was 51.9 percent, which means that we could correctly predict roughly 52 percent of the judicial votes correctly if we simply guessed a "pro-union," or liberal outcome. The fourteen variable model correctly predicted 68.8 percent of the votes, indicating a proportional reduction

in error of 35.1 percent (the PRE measure is modeled after prior research by Hagle and Spaeth 1992; Brenner, Hagle, and Spaeth 1990). This combination of ideological, background, judicial deference, and factual variables provides a robust explanation of ideological voting patterns in nonunanimous union cases (Model Chi Square = 29.2, 14 degrees of freedom).

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**INSERT TABLE 1 HERE**

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In the full model, three variables proved to be statistically significant, namely private practice, blue-collar workers, and judicial deference to a Labour Board ruling. The coefficient for private practice suggests that it is the most powerful predictor of ideological judicial voting in post-Charter union cases ( $b = -1.39$ , statistically significant at  $p = .05$ ). Thus, justices who come to the court with significant prior experience as an attorney (five or more years) are far more likely to side with business interests in union disputes. This makes intuitive sense and coincides with the hypothesis that justices coming to the high court from a privileged legal background will be more closely affiliated with the corporate elites that they predominantly represented prior to arrival on the court. The second most powerful variable in the model was whether blue-collar workers were involved in the case ( $b = 1.0$ , statistically significant at  $p = .01$ ). This coefficient suggests that, controlling for all other factors, justices were predisposed to rule in favor of blue-collar workers at a much higher rate than other types of employees. Indeed, this factor is the only salient fact pattern that appears to drive ideological conflict on the Canadian Court in the union area. The last statistically significant variable in the equation was judicial deference to a lower Labour Board ruling ( $b = .69$ , statistically significant at  $p = .05$ ). This indicator implies that Canadian Supreme Court justices are far more prone to uphold the initial decisions reached by labour boards than those issued by trial court judges. Since members of these tribunals

possess special expertise, it is not surprising that justices will defer to these bodies when controlling for all other factors.

Among the remaining variables in the initial model, seven featured estimates that were in the hypothesized direction, although none were statistically significant. These variables included party of prime minister, the background variable measuring gender, and the factual variables tapping right to strike cases, unfair labour practices, unemployment and sick leave benefits, and wrongful dismissals of employees. The three remaining variables in the model, namely strike or lockout cases, contracting out disputes, and discrimination/harassment cases, failed to produce coefficients in the expected direction. Thus, if cases involved any of these factual scenarios, the justices tended to side with corporate interests rather than the claims of the employees (controlling for all other factors). These anomalies become more readily understandable when one examines the text of the cases that feature these scenarios. The underlying explanation for the insignificance of the strike/lockout coefficient stems from the fact that each of the six cases in this area featured a more dominant issue that drove the ideological division on the high Court. For example, in both *Caron v. Canada (Employment and Immigration Commissioner)* [1991] 1 SCR 48, and *Hills v. Canada (Attorney General)* [1988] 1 SCR 513, the central issue is whether unemployment benefits should be given to workers impacted by a strike. Similarly, the central issue in *Royal Oak Mines v. Canada (Labour Relations Board)* [1996] 1 SCR 369 and *TWU v. BC Telephone Company* [1988] 2 SCR 564, was whether there was a wrongful dismissal of employees who were involved in strike actions. While both sets of cases involved instances of strikes or lockouts, the conflict that resonated between the justices centered around other salient features of the case. This helps explain why the coefficient for strike/lockout was in the wrong direction. Since four of the five cases addressing contracting out issues emerged from lower

Labour Boards, it is clear that the judicial deference question dominated Court conflict in this issue area. The two cases involving sexual harassment/discrimination complaints involved litigants who pursued novel legal strategies to extend protections beyond past patterns of case law.<sup>7</sup> Collectively these cases tend to illustrate that after conducting a textual analysis, one gains better insight into why these three factual variables were not in the hypothesized direction.

The second equation in Table 1 is included to examine the impact of the model without the inclusion of newspaper liberalism, which was highly collinear with private practice. The more parsimonious model yielded virtually identical results as those found in the first equation. In short, the same three indicators, namely private practice, blue-collar workers, and deference to a Labour Board, were the only statistically significant variables in the equation. Model fit statistics also remained robust, with the proportional reduction in error increasing slightly to 36 percent improvement. Taken together, these thirteen variables tapping ideology, judicial deference, background factors, and factual circumstances do a good job accounting for the ideological division found in post-Charter union cases.

### ***Tax Case Results***

Table 2 provides logistic regression estimates for nine independent variables that might influence disputed outcomes in non-unanimous tax disputes. The model fit statistics found at the bottom of the table indicate that 67 percent of the justices' votes could be correctly predicted with these variables in the equation. This represents a 25 percent improvement over the modal guessing strategy (56 percent), and provides evidence of a hearty explanatory model.

In the tax area, five separate independent variables proved to be statistically significant. They included the measure of ideology drawn from newspaper reports, along with each of the four factual variables in the equation (whether a case involved a dispute between national

government and company, an income tax deduction, a tax on stocks or estates, and bankruptcy claims). Intriguingly in the taxation area, it was the newspaper liberalism score, not private practice, that achieved statistical significance ( $b = .41, p = .05$ ). This discrepancy between the two measures in the two areas might be explained by the fact that prior experience in private practice has greater relevance in corporate-labour disputes simply because corporate entities make up a greater proportion of the litigants involved in these cases. As such, a judge's past allegiance with corporate interests is more likely to emerge as salient in labour disputes. In contrast, many tax cases involve disputes between the individual taxpayer and government, which necessarily reduces the probability that a judge's past corporate leanings will become a significant variable in the equation. In short, fewer opportunities for corporate allegiance will emerge in the taxation area, which may help explain the lower profile that the private practice variable occupies in this model. Having said this, it is important to realize that the private practice coefficient, although not statistically significant, was in the hypothesized direction.

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**INSERT TABLE 2 HERE**

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The most important factual variables in the model were the measures related to the type of tax involved in the case. The coefficients for income tax deductions and stock/estate taxes generated outcomes that were more favorable to taxpayers than if the case involved a sales tax issue. As expected, the justices had the greatest propensity to favor individuals and companies seeking income tax deductions, with a  $b$  of  $-1.38$  ( $p = .01$ ), followed by stock and estate taxes with a  $b$  of  $-1.12$  ( $p = .05$ ). Judging from the relative weight of the coefficients, it appears that the justices on the post-Charter Canadian Court are more prone to favor the economic liberty claims of taxpayers who seek to protect their current income from taxation as opposed to

taxation on future economic gains. Cases that involved a bankruptcy claim where government sought priority status as a creditor featured a coefficient in the hypothesized direction ( $b = -1.16$ ), and were statistically significant at the .05 level. It seems that justices did not want to give government priority consideration in bankruptcy claims, but instead viewed all creditors equally worthy in debt collection claims when all things are taken into consideration. The last factual variable that proved to be statistically significant was whether the case pitted the national government against a corporate interest, divulging a  $b$  of .80 (significant at  $p = .05$ ). The positive coefficient fits with the expectation that when one controls for all other factors, justices are most likely to support the taxation power of the national government when it involves disputes against corporate interests as opposed to tax claims involving any other type of parties, including those that pit companies or individuals against provincial governments.

Given the fact that party of prime minister was not statistically significant in the union equation, it is not surprising that it did not perform well in the taxation model. In fact, the coefficient in this model was in the unexpected direction, suggesting that when controlling for all other factors, conservative party appointees were more likely than liberals to support government taxation power. Given the consistent preeminence of the party appointee variable throughout much of the U.S. public law literature, its low level of performance in economic cases on a high court that operates in a remarkably similar fashion may be shocking to some readers. Although these results are contrary to those found by Tate and Sittiwong (1989) over a decade ago, they parallel the work of Songer and Johnson (2002), who discovered that party of prime minister had no statistically significant connection with ideological voting patterns in post-Charter civil liberties, criminal, and economic cases (1980-2000). This discrepancy may be explained by the fact that the Tate and Sittiwong (1989) study analyzed rulings that largely preceded the

introduction of the Charter, while this study, along with Songer and Johnson's (2002) focused mainly on post-Charter cases. Consequently, a key feature of this study is that the party of prime minister variable, at one time an important indicator of ideological proclivities, no longer holds the same predictive value for nonunanimous economic cases in Canada. More importantly, it illustrates that although party appointment remains a steadfast predictor of ideological division on the U.S. Supreme Court, its explanatory power is not as consistent in other high courts of advanced western democracies.

The two other variables that were not statistically significant in the equation were the background indicator of gender, and deference to a lower court ruling in the tax area, with the coefficient for gender in the unexpected direction ( $b = -.59$ ). In the case of gender, it seems that female justices are no more inclined to favor the taxation power of government than their male counterparts. While Supreme Court justices are slightly inclined to defer to lower court tax rulings, the variable proved not to be statistically significant. This is unlike the union area where justices are more likely to defer to the decisions reached by special labour board tribunals.

Given the high degree of collinearity between newspaper liberalism and private practice, the second equation in Table 2 excluded the latter variable from the model. Private practice was omitted because in the tax area the newspaper liberalism coefficient had stronger explanatory power and was statistically significant. In line with the results from the union area, we find virtually identical coefficients and model fit statistics, with the exception that the newspaper liberalism score increases in power, and is now statistically significant at the .01 level. Overall, the eight variables tapping ideology, background, judicial deference and facts provide a robust explanation of ideological divisions on the Canadian Supreme Court in post-Charter nonunanimous tax cases.

## Conclusion

This study is the first post-Charter analysis of economic voting behavior to incorporate a multivariate model that controls for judicial ideology, various case facts, social background characteristics, and institutional deference. As such, it provides a more comprehensive theoretical understanding of various factors that trigger conflict on the Canadian high court. Since our models were able to predict more than two-thirds of all union and tax votes in contested cases, they demonstrate convincingly that Canadian justices are motivated by these factors in the economic area. Specifically, there is clear evidence that the newspaper liberalism score of judicial ideology provides a powerful predictor of judicial voting behavior in Canadian tax cases. Although it did not prove statistically significant in the union area, we believe that private practice constitutes a viable surrogate for the measurement of judicial ideology, given the high collinearity between the two measures. It makes intuitive sense that justices who have extensive corporate law experience tend to be of a conservative bent, and therefore, are more prone to oppose union interests.

This study also found that the justices' predispositions toward salient case facts and norms of judicial deference were prominent predictors of the way Canadian justices vote in disputed cases. In the tax area, all four of the factual variables included in the equation achieved statistical significance. The data suggest that justices 1) tend to reject government priority claims in bankruptcy cases; 2) respond favorably to plaintiffs seeking income tax deductions and protections from stock and estate taxes; and 3) support national government efforts to tax corporate entities. However in the union area, the presence of blue-collar workers was the only statistically significant factual variable that fostered ideological conflict between the justices.

Obviously the presence of blue-collar workers is a decisive factor that weighs heavily on the minds of the justices. While it seems that the norm of judicial deference to lower trial court decisions did not appear to be a significant factor in the tax area, deference to Labour Board rulings was significant in union disputes. This disparity may be partially explained by the fact that in the labour area the Canadian system has established Labour Board tribunals to address the unique complexities of union-management conflicts. Taken together, the findings of this study are important to scholars of comparative judicial behavior because they provide a more robust account of judicial conflict on the Canadian high court, and may spark future multivariate studies of this kind.

This study is theoretically important because it confirms that the attitudes of Canadian justices, like their southern counterparts, can be found along a "Schubertian" economic continuum of ideology that pits attitudes endorsing economic freedom against notions of economic equality. In the post-Charter period, Canadian justices were almost equally as prone to favor economic equality claims as they were economic freedom interests in both areas of law (52 percent pro-union, and 44 percent pro taxing power). This finding suggests that when the justices are in conflict, overall, they have collectively staked out a moderate/centrist position in these areas of law, which is indicative of their efforts to balance individual and communitarian norms. The significance of this study is further enhanced by the identification of key factual circumstances that trigger attitudinal conflict among Canadian justices in the tax and union area. This is important because, as Segal and Spaeth noted in 2002, there are only a few studies that have been attempted, and none in the realm of economic cases, in either Canada or the United States. Scholars of comparative judicial behavior may find that similar factual circumstances are relevant in the tax and union cases of other advanced democracies.

TABLE 1

Maximum Likelihood Logistic Regression Estimates for Nonunanimous  
Economic Cases of the Supreme Court of Canada, 1984-2002

Independent Variable	Union-Management MLE Coefficient (Standard Error)	Union-Management #2 MLE Coefficient (Standard Error)
Party of PM	.058 (.194)	.003 (.178)
Newspaper Liberalism Score	-.141 (.188)	---
Private Practice	-1.385 * (.613)	-1.100 * (.480)
Gender	.564 (.417)	.464 (.391)
Blue Collar Workers in Case	1.009 ** (.402)	1.033 ** (.401)
Deference to Labour Board	.689 * (.354)	.704 * (.353)
Strike or Lockout	-.360 (.649)	-.375 (.649)
Right to Strike Case	-.028 (.803)	-.015 (.802)
Unfair Labour Practices	.199 (.520)	.170 (.520)
Contracting Out Dispute	-.012 (.471)	-.006 (.470)
Unemployment Benefits	.790 (.896)	.771 (.895)
Sick Leave Benefits	.317 (.741)	.275 (.738)
Wrongful Dismissal	.270 (.541)	.230 (.539)

TABLE 1 CONTINUED

Independent Variable	Union-Management MLE Coefficient (Standard Error)	Union-Management #2 MLE Coefficient (Standard Error)
Discrimination/Sexual Harassment	-.289 (.791)	-.208 (.784)
Intercept	-.690 (.483)	-.849 (.436)
Mean of Dependent Variable	.519	.519
Number of Cases	208	208
Proportion Classified Correctly	.688	.692
Proportional Reduction in Error	35.1	36.0
Nagelkerke R Square	.175	.172
Model Chi Square	29.19	28.63
Degrees of Freedom	14	13
p <	.010	.007

\* p < .05  
 \*\* p < .01  
 \*\*\* p < .001

TABLE 2

Maximum Likelihood Logistic Regression Estimates for Nonunanimous  
Economic Cases of the Supreme Court of Canada, 1984-2002

Independent Variable	Tax Dispute (Model 1) MLE Coefficient (Standard Error)	Tax Dispute (Model 2) MLE Coefficient (Standard Error)
Party of PM	-.604 (.536)	-.702 (.512)
Newspaper Liberalism Score	.414 * (.248)	.506 ** (.190)
Private Practice	-.400 (.711)	---
Gender	-.594 (.511)	-.635 (.510)
Deference to Trial Court Ruling	.612 (.414)	.589 (.412)
National Govt. v. Company	.795 * (.411)	.810 * (.411)
Income Tax Deduction	-1.377 ** (.565)	-1.403 ** (.563)
Stocks & Estate Tax	-1.124 * (.613)	-1.135 * (.613)
Bankruptcy Case -- Priority of Govt.	-1.157 * (.618)	-1.187 * (.616)
Intercept	.138 (.544)	.080 (.535)
Mean of Dependent Variable	.560	.560
Number of Cases	134	134
Proportion Classified Correctly	.672	.672
Proportional Reduction in Error	25.4	25.4
Nagelkerke R Square	.164	.161
Model Chi Square	17.4	17.1
Degrees of Freedom	9	8
p <	.042	.029

\* p < .05; \*\* p < .01; \*\*\* p < .001

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## Appendix -- Cases Included in the Data Analysis

### Union Cases

*Ajax (Town) v. CAW & Local 222* [2000] 1 SCR 538  
*Beliveau-St-Jacques v. FEESP* [1996] 2 SCR 345  
*Bhinder v. Canadian National Railway* [1985] 2 SCR 561  
*CAIMAW v. Paccar of Canada Ltd.* [1989] 2 SCR 983  
*Canada (Attorney General) v. PSAC* [1991] 1 SCR 614  
*Canada Safeway Ltd. v. RWDSU* [1998] 1 SCR 1079  
*Canadian Pacific Airlines v. CALPA* [1993] 3 SCR 724  
*Caron v. Canada (Employment & Immigration Commissioner)* [1991] 1 SCR 48  
*CBC v. Canada* [1995] 1 SCR 157  
*Dunmore v. Ontario* [2001] 3 SCR 1016  
*Ellis-Don Ltd. v. Ontario (Labour Relations Board)* [2001] 1 SCR 221  
*Flieger v. New Brunswick* [1993] 2 SCR 651  
*Hills v. Canada* [1988] 1 SCR 513  
*Ivanhoe Inc. v. UFCW Local 500* [2001] 2 SCR 566  
*IWA v. Consolidated-Bathurst Packaging Ltd.* [1990] 1 SCR 282  
*Lester (W. W.) (1978) Ltd. v. UAJAPPI Local 740* [1990] 3 SCR 644  
*PIPSC v. Northwest Territories* [1990] 2 SCR 367  
*Pointe-Claire v. Quebec (Labour Court)* [1997] 1 SCR 1015  
*PSAC v. Canada* [1987] 1 SCR 424  
*R. v. Advance Cutting & Coring Ltd.* [2001] 3 SCR 209  
*Re: Public Service Employee Relations Act* [1987] 1 SCR 313  
*Royal Oak Mines Inc. v. Canada (Labour Relations Board)* [1996] 1 SCR 369  
*RWDSU v. Saskatchewan* [1987] 1 SCR 460  
*Sept-Iles v. Quebec (Labour Court)* [2001] 2 SCR 670  
*Slaight Communications Inc. v. Davidson* [1989] 1 SCR 1038  
*TWU v. BC Telephone Company* [1988] 2 SCR 564  
*TWU v. CRTC* [1995] 2 SCR 781  
*United Nurses of Alberta v. Alberta (Attorney General)* [1992] 1 SCR 901  
*Vorvis v. I.C.B.C.* [1989] 1 SCR 1085  
*Weber v. Ontario Hydro* [1995] 2 SCR 929

### Tax Cases

*143471 Canada Inc. v. Quebec (Attorney General)* [1994] 2 SCR 339  
*Air Canada v. British Columbia* [1989] 1 SCR 1161  
*Alberta (Treasury Branches) v. Minister of National Revenue* [1996] 1 SCR 963  
*British Columbia v. Henfrey Samson Belair Ltd.* [1989] 2 SCR 1989  
*Canadian Pacific Ltd. v. Attorney General (Canada)* [1986] 1 SCR 678  
*Continental Bank Leasing Corp. v. Canada* [1998] 2 SCR 298  
*Friesen v. Canada* [1995] 3 SCR 103  
*Hickman Motors Ltd. v. Canada* [1997] 2 SCR 336  
*Husky Oil Operations Ltd. v. Minister of National Revenue* [1995] 3 SCR 453

*Knox Contracting Ltd. v. Canada* [1990] 2 SCR 338  
*McClurg v. Canada* [1990] 3 SCR 1020  
*Re Eurig Estate v. Attorney General of Ontario* [1998] 2 SCR 565  
*Royal Bank of Canada v. Sparrow Electronic Corp.* [1997] 1 SCR 411  
*Singleton v. Canada* [2001] 2 SCR 1046  
*Symes v. Canada* [1993] 4 SCR 695  
*The Queen v. Imperial General Properties Ltd.* [1985] 2 SCR 288  
*Union of New Brunswick Indians v. New Brunswick Minister of Finance* [1998] 1 SCR 1161  
*Vancouver Society of Immigrant & Visible Minority Women v. Minister of National Revenue*  
[1999] 1 SCR 10  
*Will-Kare Paving and Contracting Ltd. v. Canada* [2000] 1 SCR 915

## Notes

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<sup>1</sup> Although statistical analyses of Canadian economic cases have been conducted by Peck (1969), Fouts (1969), Tate and Sittiwong (1989), Songer and Johnson (2002), none have included fact variables in their statistical models.

<sup>2</sup> The Court handed down 33 nonunanimous union-management cases in the 18-year period of our study. Three cases were omitted from the analysis because the issues of national versus provincial government power, or federalism, were the dominant issues in the case (*United Transportation Union v. Central Western Railroad Corporation* [1990] 3 SCR 1112; *Re: Canadian Labour Code* [1992] 2 SCR 50; and *Ontario Hydro v. Ontario Labour Relations Board* [1993] 3 SCR 328). As such, we were unable to easily identify the ideological direction of a justice's vote in the case. In the end, our analysis of union disputes included 208 votes by justices from this era, and was based on 30 cases in the issue area. A listing of the cases included in the study is provided in the appendix.

<sup>3</sup> The votes of 21 justices are included in our data set, and for five of those justices, a moderate score was entered because no ideological commentary appeared in the newspaper coverage. We focused our attention on the *Globe and Mail* because it published consistent stories on judicial appointments to the Court over the last thirty years, and is widely seen as the most significant national newspaper of Canada. Statements that clearly identified the appointed justice as "liberal," "progressive," or "liberal minded," were used to categorize the individual as +2. Justices that were described as "moderate-liberal," or "moderate with connections to the Liberal Party in the past" were coded as +1. A similar scoring pattern was utilized for the conservative side of the spectrum. Justices who had no ideological commentary, or were described as "moderate" were scored as a 0. The full coding scheme is as follows: justices labeled as most

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liberal (+2) were Justices LaForest, L'Heureux-Dube, Lamer, Wilson, Bastarache, and Beetz; justices labeled as moderate-liberals (+1) were Justices Dickson, McLachlin, LeDain, and LeBel; justices coded as moderates were Justices Iacobucci, Stevenson, Gonthier, Cory, McIntyre, Estey, Arbour, and Binnie; one justice was labeled as a moderate-conservative (-1 -- Justice Sopinka); while justices scored as most conservative (-2) were Justices Major and Chouinard. We want to note that the coding for three of the justices differs slightly from earlier work published in 1998 by Ostberg and Wetstein. Since our measures were based on a computerized archive of articles (Factiva), while there scores were based on a published newspaper index, we were able to identify additional news stories that led us to fine-tune three of their justices' ideological scores. In short, Justices Wilson and LaForest moved from a moderate-liberal to a liberal position, while Justice McIntyre moved from a moderate-conservative to a moderate position on the ideological continuum. The coding scheme here is similar to work that Charles Smith (2000) has presented for appointments to the Court made by Prime Minister Jean Chretien.

<sup>4</sup> One could also contend that since strikes represent an extreme disruption to the economic well-being of a community, workers may be perceived by the justices as "going too far" in advancing their economic claims. Following this logic, the justices might be swayed to favor the economic liberty interests put forth by the company. However, this belief would most likely prevail only in situations where justices perceive the union is not advancing legitimate economic claims.

<sup>5</sup> In the tax area a total of 20 nonunanimous cases were handed down between 1984 and 2002. We omitted one tax dispute from the analysis because it centered on a divorce proceeding, and thus pitted a husband against a wife (rather than a taxpayer against government, see *Slattery v. Slattery* [1993] 3 SCR 430).

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<sup>6</sup> These two indicators had a correlation coefficient of -.680.

<sup>7</sup> In *Bhinder v. Canadian National Railway* [1985] 2 SCR 561, a Sikh worker attempted to claim religious discrimination because he was forced to wear a hard hat while working on the railroad. Clearly, the majority of the Court believed that wearing a hard hat was an obvious bona fide job requirement given the dangers of railroad work. In *Beliveau-St-Jacques v. FEESP* [1996] 2 SCR 345, the majority of the Court thought that a secretary who had sought to pursue a civil action after receiving workers compensation for sexual harassment suffered on the job was pushing the envelope of law.