Taking precedents seriously: The influence of stare decisis on judicial decision-making.

Mark Chalmers
University of Windsor

Follow this and additional works at: https://scholar.uwindsor.ca/etd

Recommended Citation
https://scholar.uwindsor.ca/etd/3718

This online database contains the full-text of PhD dissertations and Masters’ theses of University of Windsor students from 1954 forward. These documents are made available for personal study and research purposes only, in accordance with the Canadian Copyright Act and the Creative Commons license—CC BY-NC-ND (Attribution, Non-Commercial, No Derivative Works). Under this license, works must always be attributed to the copyright holder (original author), cannot be used for any commercial purposes, and may not be altered. Any other use would require the permission of the copyright holder. Students may inquire about withdrawing their dissertation and/or thesis from this database. For additional inquiries, please contact the repository administrator via email (scholarship@uwindsor.ca) or by telephone at 519-253-3000ext. 3208.
TAKING PRECEDENTS SERIOUSLY: 
THE INFLUENCE OF STARE DECISIS 
ON JUDICIAL DECISION-MAKING

by

Mark Chalmers

A Thesis 
Submitted to the Faculty of Graduate Studies and Research 
through Political Science 
in Partial Fulfillment of the Requirements for 
the Degree of Master of Arts at the 
University of Windsor

Windsor, Ontario, Canada

2005

© 2005 Mark Chalmers
NOTICE:
The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author’s permission.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

AVIS:
L’auteur a accordé une licence non exclusive permettant à la Bibliotheque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L’auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n’y aura aucun contenu manquant.
ABSTRACT

The author examines the influence of precedent on Supreme Court decision-making in Canada. Despite its importance, very little is actually known about the factors that affect judicial decision-making. The thesis begins by defining the doctrine of precedent, discusses the virtues of adhering to a policy of precedent, and provides a brief historical overview of the history of precedent in Canadian law. The author then reviews the three leading paradigms in judicial behavioural research as they relate to the influence of precedent. The legal model expects precedent to be among the most important factors that judges consider when making decisions. In contrast, the attitudinal model believes that judicial decisions are conditioned by the attitudes and preferences of the judges. The strategic model expects precedent to have some influence on judicial decision-making, in addition to other considerations. Based on the findings of previous research and the Court's jurisprudence, the author hypothesizes that, although judges frequently cite precedents to justify their decisions, it rarely influences how they decide cases. To test this, three separate studies are conducted. The first is a content analysis of the Court's judgments from 2004; the second study, which is based on the work of Brenner and Spaeth, examines the influence of precedent in decisions that alter precedent; the third study applies the methodology developed by Segal and Spaeth to assess the influence of precedent in all cases decided since 1950. The results show, inter alia, that the majority of Justices on the Supreme Court of Canada decide cases based on attitudinal factors, and that precedent has a minimal influence on their decision-making.
DEDICATION

This work is dedicated to my family and friends. Their constant support and encouragement made the writing of this paper possible. It is also dedicated to all the legal scholars and social scientists that have devoted their efforts to the study of judicial behaviour. Without their work, this analysis could not have been possible.
ACKNOWLEDGMENTS

Special thanks to Dr. Heather MacIvor for her invaluable assistance throughout the writing of this paper, and for constantly challenging me to be a better student. I am also grateful to Dr. Lydia Miljan for her advice during the initial stages of the research. Furthermore, I would like to thank Professor Howard Pawley, Dean Bruce Elman, and Dr. John Sutcliffe for taking time out of their busy schedules to offer their advice and comments. Finally, I am indebted to the Department of Political Science for giving me the opportunity to pursue my research interests, and for all of their support along the way.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABSTRACT</td>
<td>iii</td>
</tr>
<tr>
<td>DEDICATION</td>
<td>iv</td>
</tr>
<tr>
<td>ACKNOWLEDGEMENTS</td>
<td>v</td>
</tr>
<tr>
<td>LIST OF TABLES</td>
<td>vii</td>
</tr>
<tr>
<td>LIST OF FIGURES</td>
<td>viii</td>
</tr>
<tr>
<td>CHAPTER</td>
<td></td>
</tr>
<tr>
<td>I. INTRODUCTION</td>
<td>1</td>
</tr>
<tr>
<td>1. Precedent: Definition and Operationalization</td>
<td>4</td>
</tr>
<tr>
<td>2. The Virtues of Stare Decisis</td>
<td>7</td>
</tr>
<tr>
<td>3. The History of Stare Decisis in Canada</td>
<td>10</td>
</tr>
<tr>
<td>II. REVIEW OF THE LITERATURE</td>
<td>23</td>
</tr>
<tr>
<td>1. The Legal Model</td>
<td>23</td>
</tr>
<tr>
<td>2. The Strategic (Moderate) Model</td>
<td>35</td>
</tr>
<tr>
<td>3. The Attitudinal Model</td>
<td>43</td>
</tr>
<tr>
<td>4. Hypotheses</td>
<td>54</td>
</tr>
<tr>
<td>III. METHODOLOGY</td>
<td>55</td>
</tr>
<tr>
<td>1. The Content Analysis</td>
<td>55</td>
</tr>
<tr>
<td>2.1 The Characteristics of Precedent Altering Decisions</td>
<td>57</td>
</tr>
<tr>
<td>2.2 The Influence of Stare Decisis in Precedent Altering Decisions</td>
<td>62</td>
</tr>
<tr>
<td>3. The Influence of Precedent in all Cases since 1950</td>
<td>63</td>
</tr>
<tr>
<td>IV. RESULTS AND DISCUSSION</td>
<td>67</td>
</tr>
<tr>
<td>V. CONCLUSION</td>
<td>107</td>
</tr>
<tr>
<td>APPENDIX A: Cases included in the Content Analysis</td>
<td>110</td>
</tr>
<tr>
<td>APPENDIX B: Altering and Altered Decisions</td>
<td>114</td>
</tr>
<tr>
<td>APPENDIX C: List of Precedent and Progeny Cases</td>
<td>118</td>
</tr>
<tr>
<td>BIBLIOGRAPHY</td>
<td>131</td>
</tr>
<tr>
<td>CASES CITED</td>
<td>140</td>
</tr>
<tr>
<td>VITA AUCTORIS</td>
<td>144</td>
</tr>
</tbody>
</table>
# LIST OF TABLES

<table>
<thead>
<tr>
<th>TABLE</th>
<th>DESCRIPTION</th>
<th>PAGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>4.1</td>
<td>PARAGRAPH AUTHOR FREQUENCY</td>
<td>68</td>
</tr>
<tr>
<td>4.2</td>
<td>FREQUENCY OF MODE OF ARGUMENT</td>
<td>69</td>
</tr>
<tr>
<td>4.3</td>
<td>CROSS TABULATION OF LEVEL OF AGREEMENT AND AGE OF ALTERING DECISIONS</td>
<td>75</td>
</tr>
<tr>
<td>4.4</td>
<td>BASIS FOR ALTERING PRECEDENT</td>
<td>77</td>
</tr>
<tr>
<td>4.5</td>
<td>SUPPORT FOR INSTITUTIONAL AND PERSONAL STARE DECISIS</td>
<td>81</td>
</tr>
<tr>
<td>4.6</td>
<td>FREQUENCY OF JUSTICES' VOTES IN ALTERED AND ALTERING DECISIONS</td>
<td>84</td>
</tr>
<tr>
<td>4.7</td>
<td>VOTES IN PRECEDENT AND PROGENY CASES</td>
<td>88</td>
</tr>
<tr>
<td>4.8</td>
<td>PREFERENTIAL AND PRECEDENTIAL VOTES BY JUSTICE</td>
<td>98</td>
</tr>
<tr>
<td>4.9</td>
<td>PREFERENTIAL AND PRECEDENTIAL VOTES BY JUSTICE</td>
<td>99</td>
</tr>
<tr>
<td>4.10</td>
<td>PREFERENTIAL AND PRECEDENTIAL VOTES BY JUSTICE</td>
<td>100</td>
</tr>
<tr>
<td>4.11</td>
<td>PREFERENTIAL AND PRECEDENTIAL VOTES BY JUSTICE</td>
<td>102</td>
</tr>
<tr>
<td>4.12</td>
<td>PREFERENTIAL AND PRECEDENTIAL VOTES BY JUSTICE</td>
<td>104</td>
</tr>
<tr>
<td>4.13</td>
<td>COMBINED LIST OF PREFERENTIAL AND PRECEDENTIAL VOTES BY JUSTICE</td>
<td>105</td>
</tr>
</tbody>
</table>
LIST OF FIGURES

FIGURE

2.A  HYPOTHETICAL CASES AND JUDGES INIDEOLOGICAL SPACE  48

4.A  COMPARISON OF COMBINED LEGAL AND ATTITUDINAL VARIABLES  71
CHAPTER 1

Introduction

For the past decade Canadian legal scholars and political scientists have engaged in an intense debate over the extent to which Supreme Court decisions and Justices are "activist." The term "judicial activism" is difficult to define with precision; however, it is usually used to describe judgments wherein the Court invalidates laws passed by democratically elected representatives, or when the Justices are perceived to be deciding cases according to their personal preferences.\(^1\) Although the "activism" debate is not new in Canada, it re-emerged in the mid-1980s in large part because the introduction of the Charter of Rights and Freedoms significantly expanded the power of the judiciary to influence public policy. In an interview with the Globe and Mail early in 2005, Chief Justice Beverley McLachlin dismissed claims that the Court is "activist," arguing that commentators use the term "activism" to "mask their personal distaste for a particular judgment."\(^2\) In her opinion, the public is "coming to a better understanding of the shallowness" of the entire question of "judicial activism."\(^3\)

Whether or not one agrees with the Chief Justice, it does seem clear that it is time to move beyond the "judicial activism" debate, or at the very least, to redefine its terms. The debate over "judicial activism" should be put to rest primarily because it has proven academically unfruitful.\(^4\) Judicial activism does not offer a methodology that can be used to gain insights into judicial decisions. Instead it is a line of criticism that is inextricably tied to politics, evidenced by the fact that claims of judicial activism come almost exclusively from

---


\(^3\) Ibid.

\(^4\) Choudhry and Hunter, 530.
"right-wing" commentators. Rather than studying the implications of judicial decisions or the characteristics of Charter litigants, which have been the "dominant" focus of political science literature in Canada, scholars need to examine the factors that influence the decision-making behaviour of judges.

The doctrine of precedent, which holds that judges must follow previous judicial decisions, is widely regarded as the "fundamental principle on which judicial decision making is supposed to rest." Yet, despite its importance, precedent has received very little attention from Canadian academics in the last fifty years. In contrast, American scholars have debated the efficacy and operation of the doctrine of precedent at length. Furthermore, the U.S. media regularly discuss precedent when there is a vacancy on the Supreme Court. For example, the media coverage surrounding John Roberts' nomination as Chief Justice has focused considerably on Roberts' view of precedent as it applies to controversial decisions such as *Roe v. Wade*.

Except for a few scattered law review articles, precedent is rarely discussed by Canadian scholars or journalists. Perhaps more importantly, so much academic energy has been devoted to the "activism" debate, that there has been no attempt (that this author is aware of) to empirically assess the influence of precedent on the decisions of the Supreme Court of Canada. This is surprising because American researchers have developed

---

sophisticated methodologies which make it possible to scientifically examine the influence of precedent.

Studying the influence of precedent on the decisions of the Supreme Court of Canada is important for a number of reasons. Foremost among them is to test the conventional wisdom that precedent is the "fundamental principle" of judicial decision-making.9 Just because lawyers, judges, and the general public assume that precedent is important does not necessarily make it so. Such a bold assertion should be capable of substantiation through the use of replicable methodologies.

Whether, and to what extent, precedent influences judicial decision-making has serious implications for how the law is taught. For centuries, the study of law has emphasized the centrality of legal rules and doctrines, without actually testing to determine if they really matter when judges make decisions. As Marc Gold explains, "The study of law in Canada remains, to a large degree, the study of judicial opinions."10 While judicial opinions are certainly an important part of a legal education, more emphasis needs to be placed on the behaviour of judges, rather than just examining what they say in their judgments.

The present analysis combines various methodologies to provide a comprehensive and multidimensional examination of the influence of precedent on the decisions of the Supreme Court of Canada. It begins by defining precedent and explaining how judges use previous decisions in their judgments. The virtues of adhering to a policy of precedent are then appraised, followed by a brief historical overview of the evolution of the Supreme Court of Canada's approach to precedent. Chapter Two reviews the academic literature relating to judicial decision-making generally, and to the influence of precedent in particular. It

---

discusses the leading theoretical paradigms in judicial behavioural scholarship, and their applicability to the Supreme Court of Canada.

Based on the findings of previous research and the Court's jurisprudence, I hypothesize that, notwithstanding what the Justices say in their opinions, precedent rarely influences their decisions. To test this hypothesis, the research employs a content analysis of the Court's judgments, and applies the methodologies developed by American researchers to measure the influence of precedent on the decisions of the U.S. Supreme Court to the judgments of the Supreme Court of Canada since 1950.

Chapter Three provides a detailed explanation of the procedures used to collect, classify, and analyze the data. Chapter Four presents the results and addresses the implications of the findings. Finally, Chapter Five concludes the analysis by discussing the need for additional research into the decision-making of the Supreme Court of Canada.

1. Precedent: Definition and Operationalization

At its most basic level, precedent requires judges in common law legal systems to respect the prior decisions of coordinate or superior courts. It derives from the ancient Latin maxim "stare decisis et non quieta movere," meaning to "stand by the thing decided, and not to disturb settled points."¹¹ Black's Law Dictionary defines stare decisis as, "the doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation."¹² The ensuing analysis uses both "precedent" and "stare decisis" to describe the judicial practice of adhering to previous decisions.

The doctrine of precedent appears to have its origins in 12th century England, during the reign of King Henry II. Shortly after the signing of the Magna Carta, the King appointed a group of judges who traveled across the English countryside adjudicating disputes

---

¹² Black's Law Dictionary, s.v. "stare decisis."
According to the existing customs and traditions of the people. Over time, these judges began to keep informal reports of their judgments that they and other judges consulted in future cases. This rudimentary reporting system is significant because it allowed judges to render similar decisions in analogous cases. The practice of following the decisions of other judges grew from the absence of a written code in England and the corresponding need to create a uniform system of laws that were common throughout the whole Kingdom.

Although it is unclear precisely when the “modern” doctrine of *stare decisis* became established as a judicial policy, it appears to have been during the eighteenth century. Moreover, there is substantial agreement among scholars that, in order to develop properly, the practice of following precedent requires the creation of an official system of reporting judicial decisions. According to Lewis, “wherever judicial decisions are systematically reported their authority tends to increase.” Similarly, in her book, *The Majesty of the Law*, retiring U.S. Supreme Court Justice Sandra Day O’Connor emphasizes the importance of reporting judicial decisions by devoting an entire chapter to the history of the Supreme Court Reports. Thus, the common law developed on a case-by-case basis, with judges applying and expanding rules contained in reports of previous judicial decisions.

The eminent American legal scholar Roscoe Pound described precedent as the distinguishing feature of the “common law technique” of judicial decision-making, which conceives of law “as experience developed by reason and reason tested and developed by experience.” According to Pound, “it is a technique of finding the grounds of decision in

---

16 Lewis, 215.
recorded judicial experience...." Thus, past judicial decisions carry authority in that they serve to justify subsequent decisions in similar cases. As a heuristic device, precedent is not unique to the decision making of judges; individuals regularly consult past experiences when making present decisions. However, unlike most people, judges are institutionally required to follow their own prior decisions and those of other judges.

Under the doctrine of precedent, courts are bound to follow their own previous decisions as well as the decisions of superior courts in their jurisdiction. Specifically, judges are required to follow the ratio decidendi, which means the “reason for deciding,” contained within previous judgments. Professor Goodhart explains that in order to determine the ratio decidendi of a judgment, one must identify “the material facts as seen by the judge and his conclusion based on them.” The material facts of a case are those which the judge feels are the most relevant to the disposition of the case. When the material facts of a precedent case are “identical” to those in a subsequent case, judges are bound to apply the ratio from the first case.

In contrast, extraneous judicial statements that are unnecessary to a decision are considered obiter dicta, which means literally “words in passing.” In their opinions judges often speculate as to how the case would have resulted had certain facts been different. These types of statements are an example of obiter dicta. They are persuasive, but unlike the ratio, statements made in obiter do not bind lower courts. It should be noted that determining the ratio and obiter of a particular judgment is not an exact science, evidenced by the fact that judges frequently disagree with their colleagues as to which rules are binding and which are not.

19 Ibid.
22 Ibid.
23 Cross, 80.
Moreover, a judge can “distinguish” a precedent if he or she feels that the prior case is inapplicable because it differs in some materially relevant aspect from the case presently under consideration. In some instances, judges will distinguish cases to avoid applying precedents which they do not agree with. The most significant departure from the doctrine of precedent occurs when a judge or court overrules a prior decision. Overruling a decision differs from distinguishing, in that the latter retains its precedential force while overruled decisions do not.

2. The Virtues of Stare Decisis

Following precedent is, in effect, a self-enforcing policy norm, meaning that it is not prescribed by any “positive” source of law such as a statute or constitution. Nevertheless, legal scholars and members of the judiciary have long maintained that adherence to precedent promotes important values associated with the rule of law, including fairness, stability and predictability. For these reasons, the doctrine of precedent is described by the legal academy as an essential part of judicial decision-making in a common law system.

According to its supporters, stare decisis promotes fairness by ensuring that like cases will be treated alike. For a legal system to be considered fair, individuals in similar circumstances must be subject to the same legal consequences. As former U.S. Supreme Court Justice William Douglas stated, “there will be no equal justice under law if a negligence rule is applied in the morning but not in the afternoon.” Furthermore, stare decisis promotes fairness by limiting judicial discretion. The Framers of the U.S. Constitution believed that the doctrine of precedent was one way to limit the discretion of the federal

---

24 See Cross, 48.
judiciary. As Alexander Hamilton stated in The Federalist No. 78, “to avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents...”\textsuperscript{28} From this perspective, following precedent ensures that the outcomes of legal disputes depend on legal considerations and not on the personalities and proclivities of individual judges.

Commentators also argue that precedent imparts stability to the legal system by preventing dramatic changes in legal rules or doctrines. In Justice Douglas’s words, “\textit{stare decisis} serves to take the capricious element out of law and to give stability to society.”\textsuperscript{29} Similarly, Monaghan contends that adherence to precedent promotes “system-wide stability” by ensuring the survival of important governmental norms.\textsuperscript{30} While these norms may evolve over time, \textit{stare decisis} prevents the judiciary from radically altering their content. Thus, \textit{stare decisis} fosters stability, which, in turn, increases the public’s confidence in the law.

Furthermore, following prior judicial decisions provides predictability and continuity to the legal system. Former U.S. Supreme Court Justice Felix Frankfurter maintained that predictability is “rooted in the psychological need to satisfy reasonable expectations.”\textsuperscript{31} It is fundamental to the rule of law that people be able to predict the legal consequences of their actions. As Justice Anglin of the Supreme Court of Canada stated in a 1909 decision, “it is of supreme importance that people may know with certainty what the law is, and this end can only be attained by loyal adherence to that doctrine of \textit{stare decisis}.”\textsuperscript{32} Moreover, the utility of transactions such as wills and contracts depends upon the ability of individuals to predict

\textsuperscript{29} Douglas, 736.
the applicable legal rules. Hence, maintaining the continuity of the law through adherence to precedent enables people to arrange their future affairs with certainty.

In addition to rule of law considerations, commentators have argued that adherence to precedent serves a number of practical purposes related to the efficient administration of the legal system. For example, economically oriented scholars assert that application of *stare decisis* limits a court’s agenda, thereby conserving scarce judicial decision-making resources. As Justice Cardozo observed, “the labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case…” By preventing the constant reconsideration of settled legal questions, precedent economizes adjudicative resources, thereby allowing courts to resolve more cases.

Another practical benefit of following *stare decisis* is, according to some scholars, that it improves decision-making. Specifically, Lee and others argue that adherence to precedent improves the quality of judicial decision-making because judges can draw from the accumulated experience and expertise of other judges. As Judge Easterbrook notes, “subjecting each judge’s work to the test of congruence with the conclusions of those confronting the same problem... increases... the chance of the court’s being right.” Accordingly, adherence to precedent has the potential to improve judicial decision-making and reduce the number of erroneous judgments.

---

33 Rehnquist, 348.
3. The History of Stare Decisis in Canada

As a colony of the British Empire, Canada inherited many traditions of the common law, including the practice of following precedent. In fact, precedent has been an important feature of the Canadian legal system since before Confederation in 1867. The remainder of this chapter provides a brief history of the doctrine of precedent at the Supreme Court of Canada. The discussion is divided into three periods: 1875 to 1949, during which all Canadian courts were required to follow the judgments of the Judicial Committee of the Privy Council (JCPC); 1950 to 1981, when the Supreme Court achieved independence from the JCPC and developed its own approach to precedent; and 1982 to the present, when the Court was forced to reformulate how it treated previously decided cases to accommodate the introduction of the Charter of Rights and Freedoms.

From its creation in 1875 until 1949, the Supreme Court of Canada was an inferior tribunal in that its decisions could be appealed to and reversed by the JCPC in London. As the supreme judicial body, the judgments of the JCPC bound all colonial courts that were subject to English law. Moreover, in addition to being bound by the judgments of the JCPC, the Supreme Court of Canada was also required to follow the judgments of the House of Lords, including the Lords’ policy of strictly adhering to their own precedents.

This policy was firmly established in the case of London Street Tramways v. London City Council. At issue was whether the Lords were bound by their previous judgments. In concluding that the Lords were bound by their own decisions, Lord Halsbury stated that the inconvenience created by an erroneous decision was minimal “compared with the... disastrous inconvenience — of having each question subject to being re-argued and the

---

40 Peter Hogg, Constitutional Law of Canada (Scarborough: Thomson Canada Ltd., 2004), 246, note 102.
dealings of mankind rendered doubtful by reason of different decisions..." Under this approach, the decisions of the House of Lords were regarded as conclusive authorities. The Privy Council, unlike the House of Lords, never accepted that it was absolutely bound by its own decisions. Nevertheless, the JCPC scrupulously adhered to precedents, evidenced by the fact that there was no instance during this time period in which it explicitly overruled a previous decision in a constitutional case.

The Canadian version of this policy was articulated by Duff J. of the Supreme Court in the 1909 case of Stuart v. Bank of Montreal. Justice Duff explained that,

This court is, of course, not a court of final resort in the sense in which the House of Lords is because our decisions are reviewable by the Privy Council; but only in very exceptional circumstances would the... Lords Justices, sitting in appeal... have felt themselves at liberty to depart from their own previous decisions... Quite apart from this, there are, I think, considerations of public convenience too obvious to require statement which make it our duty to apply this principle to the decisions of this court.

Justice Duff’s statement is a clear indication that the Court regarded itself as absolutely bound to follow the decisions of the JCPC. While Duff J. did not completely deny that the Court could depart from precedent, such departures were justifiable “only in very exceptional circumstances.” Thus, Supreme Court of Canada’s attitude toward the application of precedent during this period paralleled the rigid, mechanistic approach which prevailed in England.

Not all Canadians were content with the inferior status of the Supreme Court in the years immediately after Confederation. As one commentator observed, “In the years between 1875 and 1949 the abolition of appeal to the Privy Council was never far from the political

---

42 Ibid.,
43 Cross, 106.
45 Bora Laskin, Canadian Constitutional Law (Toronto: Carswell Co. Ltd., 1966), 191; see also Hogg, 247 at note 110. Hogg notes that the “Privy Council did occasionally depart from precedent, but never admitted that it was doing so.” As an example, he cites the Radio Reference, [1932] A.C. 304 (P.C.) and A.G. Ontario (Labour Conventions), [1937] A.C. 326 (P.C.).
The Privy Council's critics objected to having decisions of national significance made by a tribunal so far removed from the realities of life in Canada. They claim that their Lordships' lack of familiarity with Canada's affairs caused them to misinterpret the British North America Act in a manner that "produced a constitution that was nearly the reverse of the system of government intended by the framers of that document." This unsatisfactory condition led to multiple attempts to abolish appeals to the Privy Council.

The first attempt occurred in 1875 as part of the act that established the Supreme Court of Canada. In its original form, the act included a clause that would have eliminated all appeals to the Privy Council. However, following a threat by the Secretary of State for Colonies that royal assent would be withheld, the clause was removed and replaced by one that recognized the right of appeal to the JCPC. The next attempt took place in 1888 when Parliament enacted an amendment to the Criminal Code providing for the abolition of appeals to the JCPC in all criminal matters. That amendment remained in effect for thirty-eight years, until it was declared invalid by the Privy Council in *Nadan v. The King*.

In 1933, Parliament again enacted legislation to abolish the right of appeal to the JCPC in criminal cases. Two years later, the Privy Council upheld this legislation in a decision that was "based upon the constitutional changes produced by the Statute of Westminster." Specifically, the Statute of Westminster, which was enacted in 1931, conferred on the colonies the power to repeal or amend Imperial Statutes. The JCPC held that the legislation abolishing criminal appeals in Canada was a valid exercise of this new power.

---

49 Livingston, 105.
51 Livingston, 107.
Finally, the Canadian government introduced a bill in 1939 to abolish the remaining appeals to the JCPC. It became law in 1949 after being upheld by the Privy Council in A.G. Ontario v. A.G. Canada. Since that time, the Supreme Court has been the final court of appeal in all matters relating to Canadian law.

Despite its newly acquired freedom, the Supreme Court continued to strictly follow its own precedents and those established by the Privy Council from 1949 until approximately the late 1950s. During this period, Donald Fouts contends that, with a few exceptions, the Court continued to adhere "rigorously to the doctrine of stare decisis." Gradually, the Court relaxed its approach, and accepted that it was not absolutely bound by its own decisions or those of the JCPC. In Re The Farm Products Marketing Act, a case decided in 1957, the Supreme Court signalled for the first time its willingness to relax the rule which it had imposed on itself in Stuart v. Bank of Montreal. In his concurring opinion, Justice Rand stated that,

> The powers of this Court in the exercise of its jurisdiction are no less in scope than those formerly exercised in relation to Canada by the Judicial Committee. From time to time the Committee has modified the language used by it in the attribution of legislation to the various heads of ss. 91 and 92... and that incident of judicial power must, now... be exercised in revising or restating those formulations that have come down to us.

Despite Justice Rand’s statement, Professor Hogg notes that the first time the Court actually refused to follow a Privy Council decision in a constitutional case did not occur until 1978.

Perhaps the most important development to have an impact on the doctrine of precedent in Canada during the period from 1950 to 1981 took place, ironically, in England.

---

56 Ibid., 272.
That development was the House of Lords’ *Practice Statement* of 1966, in which the Lords declared that they were prepared to “depart from previous decisions when it appears right to do so.”\(^{58}\) The *Practice Statement* effectively abolished the rule of absolute *stare decisis* that was created by the Lords in *London Tramways Co. v. L.C.C.*, and followed by courts throughout England and Canada.\(^{59}\) Moreover, Gordon Bale argues that the *Practice Statement* “helped to prepare a favourable climate for such a declaration in Commonwealth legal circles.”\(^{60}\)

In the years immediately after the *Practice Statement*, the Supreme Court of Canada came to accept a more flexible rule of *stare decisis*. This change of attitude is reflected in Chief Justice Laskin’s statement in *Harrison v. Carswell*, in which he explains that, “[t]his Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever the respect it would pay to such decisions.”\(^{61}\) Throughout the 1970s, the Court overruled or refused to follow its previous decisions on a number of occasions.\(^{62}\) Since then, the Court’s approach to *stare decisis* is based on the principle that no decision is absolutely binding.

From 1950 to 1981, the Court also formulated certain rules governing the operation of precedent in the Canadian legal system. The first was the hierarchical, or vertical rule of *stare decisis*, under which the decisions of the Supreme Court are binding on all “inferior” courts in Canada. In *Woods Manufacturing v. The King*, a case decided two years after appeals to the JCPC were completely abolished, the Court unequivocally asserted its position

---

\(^{58}\) *Practice Statement* (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.).

\(^{59}\) Cross, 107.


\(^{62}\) Hogg, 246.
at the top of the Canadian judicial hierarchy.\textsuperscript{63} Chief Justice Rinfret, speaking for the full court, stated that, \textquote{It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding.}\textsuperscript{64}

However, \textit{stare decisis} does not apply horizontally to the decisions of coordinate courts. For instance, a decision by a local judge in Windsor is not binding on other local judges throughout Ontario. The same rule applies to the decisions of provincial appellate courts. As Chief Justice Laskin explained in \textit{Wolf v. The Queen}, \textquote{A provincial appellate Court is not obliged, as a matter either of law or of practice, to follow the decision of the appellate Court of another province.}\textsuperscript{65} Thus, the Canadian judicial system is based on a hierarchical structure in which precedential authority flows vertically from the top down.

Another significant development relating to the doctrine of precedent occurred in 1980 as the result of the Supreme Court's decision in \textit{Sellars v. The Queen}. In \textit{Sellars}, the Court fundamentally altered the traditional common law distinction between the \textit{ratio decidendi} and \textit{obiter dicta} by holding that statements made in \textit{obiter} are binding on lower courts.\textsuperscript{66} Traditionally, \textit{obiter} statements of a high court have been accorded respect by lower courts, but have never been considered binding.\textsuperscript{67} Whenever lower courts follow these \textit{obiter} statements, they have done so voluntarily. Through its decision in \textit{Sellars}, the Court significantly expanded the portion of its judgments which are considered binding on lower courts by altering the traditional distinction between \textit{ratio} and \textit{obiter}.

\textit{Sellars} was convicted of murder based primarily on the evidence of an admitted accessory after the fact. He appealed the conviction on the ground that the trial judge failed to

\textsuperscript{64} Ibid., 515.
\textsuperscript{67} Cross, 80.
instruct the jury that they should be cautious in relying on this uncorroborated evidence. Specifically, he argued that juries should apply the same standard when considering the veracity of uncorroborated evidence given by accessories after the fact as is used to consider evidence given by accomplices. The trial judge ruled against Sellars and instructed the jury that because the witness was an accessory after the fact, "there was therefore no need to warn them as to the danger of accepting his uncorroborated evidence as if he were an accomplice." 

After Sellar's trial, the Supreme Court of Canada held in Paradis v. The Queen that the testimony of accessories after the fact was subject to the same evidentiary rules that apply to accomplices. Although this statement was obiter, the Supreme Court relied on Paradis to reach its decision in Sellar's appeal. Specifically, the Court held that the trial judge erred in his instruction to the jury, but dismissed Sellar's appeal because "no substantial wrong or miscarriage of justice resulted from the misdirection..." Therefore, Sellars is significant for establishing that "where the Supreme Court expresses an opinion on a point of law, then such ruling is binding on lower Courts notwithstanding it was not absolutely necessary to rule on the point in order to dispose of the appeal."

A number of commentators initially argued that the Sellars judgment dramatically altered the common law in Canada. For example, discussing the effect of Sellers case in an article published one year after the judgment, Gilbert argued that it had the potential to produce a "radical change in the principle of stare decisis..." However radical the Court's decision in Sellars appeared at the time, its long-term effect has been minimal. In fact, the

---

68 Sellars, 528.
69 Ibid.
71 Sellars, 527.
72 Ibid.
Court has stated in subsequent decisions that *obiter dicta* comments do not bind lower courts.\(^7^4\)

From 1982 to the present, the Supreme Court substantially refined its approach to *stare decisis*. In particular, the changes produced by the introduction of the Canadian Charter of Rights and Freedoms in 1982 forced the Court to reconsider its jurisprudence in a number of areas of law. While the Court continued to believe that “compelling circumstances” were necessary to justify departing from a prior decision, the Justices have also indicated that they consider the Charter a sufficient basis on which to alter precedent. For example, in *Therens*, the majority effectively overruled an earlier decision governing the interpretation of the term “detained” in the Bill of Rights, by refusing to apply it in cases involving the Charter.\(^7^5\)

Moreover, in his dissenting opinion in *R. v. Bernard*, Chief Justice Dickson stated that the “special mandate” of the Charter requires the Court to reconsider, and where necessary, to overrule its previous decisions.\(^7^6\) Thus, pre-Charter decisions that fail to respect constitutionally entrenched values are subject to reversal by the Supreme Court.

Chief Justice Dickson’s opinion in *Bernard*, which was joined by Lamer J., argued that the Court should overrule its pre-Charter decision in *Leary v. The Queen*. The decision in *Leary* introduced the distinction between “general” and “specific” intent as it relates to self-induced intoxication.\(^7^7\) Dickson C.J. maintained that *Leary* imposes a form of absolute liability on intoxicated offenders which violates the Charter right to be presumed innocent.

\(^7^4\) See Manitoba Provincial Judges Association v. Manitoba (Minister of Justice), [1997] 3 S.C.R. 3 at par. 168. Chief Justice Lamer stated that, “the remarks of Le Dain J. were strictly *obiter dicta*, and do not bind courts below…”


until proven guilty. However, a majority of the Justices disagreed and voted to uphold the rule established in *Leary*.

In arguing that *Leary* should be overruled, Dickson C.J. listed three factors in addition to the Charter, which would justify the Court departing from a previous decision. These factors are: (1) the decision has been “attenuated” by subsequent decisions; (2) the decision creates uncertainty; (3) the decision should not be overruled where the effect of overruling would be to expand criminal liability. Although the factors listed by Dickson C.J. are not exhaustive, *Bernard* was the first time the Court made a serious effort to establish rules governing the alteration of precedent. These factors were adopted by a majority of the Justices in *Chaulk* and subsequently refined in *B (K.G.)*. In addition to the factors listed in *Bernard*, the Court has also stated that it would be less willing to alter decisions arrived at after full argument and deliberation.

The Court added to this list more recently in *R. v. Robinson*, offering five reasons why the evidentiary rules established in *Beard* should be overruled. For the majority, Lamer C.J. explained that *Beard* should be overruled because: (1) there were “strong dissenting opinions” in subsequent cases involving the application of the *Beard* rules; (2) the rules have not been followed consistently by lower courts; (3) developments in other jurisdictions support overruling; (4) there is considerable academic commentary in favour of overruling; (5) the rules are inconsistent with the Charter. Most of the factors listed by Lamer C.J. relate either directly or indirectly to those which were originally stated in *Bernard*. These factors continue to guide the Court in the exercise of its authority to alter precedent.

---

78 *Bernard*, 850.
79 Ibid., 855.
80 Ibid., 858.
81 Ibid., 860.
The Supreme Court has also indicated that it will alter common law rules when necessary to keep the law relevant to the needs of a constantly changing society. In *R. v. Salituro*, a unanimous Court stated its willingness to “adapt and develop common law rules to reflect changing circumstances in society at large.” Moreover, the Court approvingly referred to the *Practice Statement* in support of the proposition that “too rigid adherence to precedent may lead to injustice...and also unduly restrict the proper development of law.” Accordingly, it is the duty of the Supreme Court to strike the proper balance between the principle of continuity in the law, and the need to ensure the law develops over time. As a general rule, the Court will make “slow” and “incremental” changes to the common law, while leaving “complex” changes to the legislature. Taken together, these rules form the basis of the Supreme Court of Canada’s current approach to the doctrine of precedent.

From a comparative perspective, the Supreme Court of Canada’s approach to precedent is similar to the approaches followed by the High Court of Australia and the U.S. Supreme Court. Shortly after appeals to the JCPC were abolished, the High Court of Australia asserted that it was no longer bound by its previous decisions or by the decisions of the Privy Council. The High Court, like the Supreme Court of Canada, believes that appellate courts have a “creative role” to play in adapting the law to new social conditions, which, in turn, requires that they have the power to depart from previous decisions.

The general attitude of the Australian High Court toward the doctrine of precedent is perhaps captured best by the comments of Justice Murphy in *Queensland v. The Commonwealth*. In particular, Justice Murphy stated that, “past judicial decisions should not

---

87 Ibid.
88 Ibid., 666 – 668.
90 Viro v. The Queen, [1978] 141 C.L.R. 88 (H.C. Aust.).
be elevated to a status higher than the Constitution itself."91 Thus, while judicial decisions may be important, they are not immutable. The Australian High Court has also developed a four-factor test used to determine whether a precedent should be overruled.92 This test resembles the one developed by the Supreme Court of Canada in Bernard, but has been described as "more theoretically sound."93

The United States Supreme Court has taken a similar approach to the doctrine of precedent. Specifically, the U.S. Supreme Court has stated that stare decisis is "usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."94 However, precedent is not a "universal inexorable command," and the Court will depart from its previous decisions when it is appropriate to do so.95 In fact, the Court has overruled numerous precedents throughout its over two-hundred-year history.96

This is especially true of cases involving the Federal Constitution, "where correction through legislative action is practically impossible..."97 By design, amending the U.S. Constitution is an extremely difficult task. For that reason, the Supreme Court has been more willing to overrule its Constitutional decisions compared to its statutory precedents which Congress can easily "correct" through ordinary legislation.98 The U.S. Supreme Court's attitude toward constitutional precedents is perhaps characterized best by the famous maxim first stated by Justice Douglas, advising his colleagues to remember that it is a Constitution which judges "swore to support and defend, not the gloss which [their] predecessors may

91 Queensland, 610.
95 Ibid.
97 Burnet, 406.
have put on it.” In contrast, the Supreme Court of Canada does not explicitly distinguish between constitutional and statutory precedents.

One exception to this policy concerns decisions that have become “so embedded” in the U.S. system of government, such as Roe v. Wade, “that return is no longer possible.” Because of their national significance, these cases are regarded as being beyond the power of the courts to overturn. Moreover, the Court will also strictly adhere to precedents in cases involving property and contract rights, “where reliance interests are involved.” In addition to these considerations, the U.S. Supreme Court examines whether a precedent has proven “unworkable,” or been undermined by other legal/factual developments to warrant it being overturned.

Thus, the Supreme Court of Canada’s practices relating to precedent are similar to those followed by the Justices on the U.S. Supreme Court and the High Court of Australia. In particular, all three tribunals subscribe to a flexible version of stare decisis, which, while emphasizing the need for continuity in the law, holds that no decision is beyond review. Notwithstanding what the Supreme Court of Canada has said regarding the application of stare decisis, its approach remains largely underdeveloped relative to those of the U.S. and Australian Supreme Courts.

The failure to articulate a clear, consistent doctrine of precedent has generated considerable confusion among academics and members of the legal community in Canada. For example, in recent years, scholars have noted that the Supreme Court of Canada

---

99 Douglas, 736.
102 Casey, 857.
has been extremely reluctant to explicitly overrule its previous decisions. Instead of overruling, Richard Haigh explains, the Court “almost always engage[s] in hair splitting and tortured reasoning in an attempt to distinguish its earlier precedents.”

To add to the confusion, the Court frequently overrules or alters precedent without saying so, or providing reasons why. On the rare occasions when the Court does explicitly overrule, it has been described as “so dismissive of its own earlier precedent as to lead one to wonder whether old cases have any value whatsoever.” The inquiry will now examine the “value” of “old cases” by examining the influence of precedent on the decision-making of the Justices on the Supreme Court of Canada.

---

104 Haigh, 141.
106 Haigh, 141.
CHAPTER 2
Review of the Literature

In order to assess the influence of precedent, it is first necessary for researchers to examine the general features of judicial decision-making behaviour. Throughout the latter half of the 20th century, social scientists and legal scholars developed a number of theoretical models that attempt to explain the factors influencing judicial decision-making. These theories can be classified into three broad explanatory models: the legal model; the strategic (or moderate) model; and the attitudinal model.

The legal model, which dominated jurisprudential scholarship until the mid-20th century, holds that precedent is one of the most important factors that judges consider in making their decisions. At the other end of the theoretical spectrum is the attitudinal model, which theorizes that, at the level of the Supreme Court, precedent has almost no influence on rulings of the justices. According to the attitudinal model, Supreme Court justices decide cases based on their own personal values and policy preferences. Both the legal and attitudinal models seek to parsimoniously explain and predict judicial behaviour by focusing on the impact of a particular set of variables considered to be important. Between these two extremes is the strategic model, which leaves some room for the influence of precedent in addition to other variables. While the moderate perspective will be briefly examined, this review will focus primarily on the legal and attitudinal models, because they are the leading paradigms in judicial behaviour scholarship and most relevant to the present inquiry.

1. The Legal Model

The belief that precedent plays a pivotal role in determining case outcomes derives from the tenets of the legal model of judicial behaviour. According to the legal model, judges decide cases based on factors including, case facts, the plain meaning of
constitutional/statutory texts, legislative intent, canons of construction, and precedent.¹ The premise underlying the legal model is that by impartially applying these “legal rules,” or “neutral principles,” to the facts of the case under consideration, judges can arrive at an objectively correct decision.² According to the legal model, the judicial function is to “discover” the law as it exists, rather than “create” it anew.

Perhaps not surprisingly, support for the legal model comes almost exclusively from judges and members of the legal academy. This is to be expected given that the legal profession requires its practitioners to understand and use legal rules such as precedent. Professor Frederick Schauer has argued that adherents of the legal model espouse an “idealized” view of judging that emphasizes judicial objectivity and infallibility.³ He explains that this view is “cultivated by the judiciary, celebrated by the culture of lawyers and law schools, and accepted by most members of the public.”⁴ It is common for proponents of the legal model to assert that judges are objective, impartial, and dispassionate in rendering their judgments. Whether or not this is true, the idealized view of the judicial function represents an important philosophical assumption underlying the legal model.

According to the legal model, the process of applying legal rules simply requires judges to use syllogistic logic and analogous reasoning. Describing this process, Professor Edward Levi states that, “a proposition descriptive of the first case is made into a rule of law

⁴ Schauer, “Incentives,” 624.
and then applied to the next similar situation.”5 Similarly, the late U.S. Supreme Court Justice Cardozo explained that in deciding cases, judges must search through the existing body of precedents to find cases with facts and legal questions analogous to those presently under consideration. From this perspective, judges simply “match the colors of the case at hand against the colors of the many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.”6 Therefore, proponents of the legal model maintain that when a judge determines that two cases are factually and legally similar, the rule of law in the first case is syllogistically applied to the second case. Although Levi and Cardozo were not supporters of the legal model, their accounts of the process through which judges apply legal rules are illustrative of the legalist position.

The notion that objectively correct answers to legal problems can be discerned through “mechanical” application of “neutral” principles, including precedent, traces its origins to the work of the renowned English jurist Sir William Blackstone. For Blackstone, judges are the “depositary of the laws; the living oracles,” who must decide cases “not according to [their] own private judgment, but according to the known laws and customs of the land.”7 Blackstone’s description of judges as “living oracles” implies that they have supernatural, or at least superhuman abilities, and therefore reflects the previously noted tendency among supporters of the legal model to hold an “idealized” view of the judiciary.

According to Blackstone, judges are not empowered to pronounce new laws, but rather to “maintain and expound” those already in existence.8 The only exception to this rule is in the case of laws that are “flatly absurd or unjust.”9 Moreover, judges are under no

---

8 Ibid.
obligation to follow laws that are contrary to reason or the divine law. For Blackstone, "it is
an established rule to abide by former precedents, where the same points come again in
litigation." He concludes that, "precedents and rules must be followed," if for no other
reason than "to keep the scale of justice even and steady...." Thus, Blackstone believes that
fairness requires judges to mechanically apply previously announced legal principles to
present situations. Furthermore, judges exercise almost no discretion in the application of
these principles.

Few contemporary commentators accept Blackstone’s description as an exhaustive
explanation of how judges decide cases. However, neo-legalist scholars continue to consider
traditional legal factors as central to the judicial decision-making process. Among them is
Ronald Dworkin, who is perhaps this generation’s most influential legal scholar. In his work,
Taking Rights Seriously, Dworkin challenges the position that judges are free, and in fact
required, to exercise discretion in adjudicating disputes. According to Dworkin, although
precedents only “incline” judges toward certain results, they are “not free to pick and choose
amongst the principles and policies” that make up the doctrine of stare decisis. Even in
“hard cases” where there are no existing precedents, judges must “discover what the rights of
the parties are,” and not invent new ones. He insists that, “judges do not have discretion in
the matter of principles....”

Based on Dworkin’s approach, precedent may exert two types of force on subsequent
decisions: an “enactment force” relating to its effect on future cases “covered by its exact
words;” and a “gravitational force,” which refers to its effect on cases that are not directly

10 Ibid, 69.
11 Ibid.
13 Ibid., 47.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
covered by the language of the precedent. The "gravitational force" of a precedent is justified in terms of fairness; that is, treating like cases alike. As Dworkin explains, "A precedent is the report of an earlier political decision; the very fact of that decision, as a piece of political history, provides some reason for deciding other cases in a similar way." Furthermore, it is noteworthy that Dworkin uses a mythological judge named "Hercules" to illustrate how judges decide cases. Thus, Dworkin's account of the judicial decision-making process is similar in many ways to Blackstone's description. Specifically, both hold an "idealized" view of judging which is based on the belief that judges exercise almost no discretion in the application of legal rules such as precedent.

The legal model also receives support from many scholars and jurists who identify themselves as followers of "interpretivism." "Interpretivism," which is sometimes referred to as "originalism," "intentionalism," or "textualism," is a theory of constitutional interpretation that requires judges to locate the meaning of constitutional provisions in the text, the authors' intent, and in previous judicial decisions. According to "interpretivists," constitutional texts have a fixed and definite meaning which can be ascertained by examining the aforementioned sources. An interpretation that does not derive from these sources is regarded as an illegitimate exercise of judicial power. As U.S. Supreme Court Justice Antonin Scalia

---

15 Dworkin, 133; see also Schauer, "Precedent," 571. Prof. Schauer explains, "The previous treatment of occurrence X in manner Y constitutes, solely because of its historical pedigree, a reason for treating X in manner Y if and when X again occurs."
argues, “interpretivism” establishes an objective “criterion that is conceptually quite separate from the preferences of the judge….”\(^{17}\)

The theory of “interpretivism” emerged in the United States during the 1980s as a conservative reaction against the perceived “liberal-activism” of the Supreme Court under the leadership of Chief Justices Earl Warren and Warren Burger. Former U.S. Attorney General Edwin Meese described the Warren and Burger eras as a “a quarter century of judicial activism, in which the text of the Constitution, precedent, and certainty were cast aside in favor of the wild flings of judicial fancy….”\(^{18}\) Meese and other critics claimed that the Court had overstepped its authority by “creating” rights, such as abortion and the Miranda warnings, which have no textual or historical foundation in the Constitution.\(^{19}\) Thus, “interpretivism” was designed to limit the discretion of judges, and in particular, the ability of the judiciary to fundamentally alter the meaning of the Constitution.

While “interpretivism” enjoys considerable support among legal scholars and members of the Federal judiciary in the U.S., its reception has been far less favourable in Canada. Since the adoption of the Charter, a relatively small group of scholars has used the “interpretivist” framework to critique the work of the Supreme Court.\(^{20}\) Two of the Court’s most vocal “interpretivist” critics, professors Morton and Knopff, argue that the Justices have interpreted the Charter according to their personal values without regard for text or the intention of its drafters. According to them, the Court follows a “flexible” approach to Charter interpretation, which is “of the sort that allows changing white in to black (or oaks

---

19 Ibid.
Morton and Knopff maintain that the Court has legitimized this flexibility by importing the "living tree" doctrine into the realm of Charter interpretation.

The "living tree" analogy was first used in Canadian law by Lord Sankey of the JCPC in a case which dealt with whether women were considered "persons" under the B.N.A. Act 1867. Traditionally, the legal definition of a "person" was restricted to men. In deciding that women were "persons," Lord Sankey stated that their Lordships do not desire "to cut down the provisions of the [B.N.A.] Act by a narrow and technical construction, but rather to give it a large and liberal interpretation...." Moreover, Lord Sankey described the Constitution as a "living tree," which must be "capable of growth and expansion within its natural limits."

The Supreme Court has used the "living tree" doctrine since its first Charter decision to justify progressively interpreting rights and freedoms. As Justice Estey explained in Law Society of Upper Canada v. Skapinker, "Narrow and technical interpretation, if not modulated by a sense of the unknowns of the future, can stunt the growth of the law and hence the community it serves." For Morton and Knopff, this approach undermines the purpose of the constitutional amending procedures, and "makes a mockery of the very purpose of a written constitution." As a solution, they advise the Court to adopt an "interpretive" method of interpretation that is faithful to the text and history of the Charter.

As previously noted, support for the legal model is largely limited to legal commentators and members of the judiciary. In contrast, social scientists have been far more

---

23 Ibid., 136.
24 Ibid.
26 Morton and Knopff, 545.
sceptical of the utility of the legal model to explain the process of judicial decision-making.\textsuperscript{27} Prior to the 1990s, studies of precedent, like most legal subjects, were generally doctrinal and descriptive in design.\textsuperscript{28} Spaeth and Segal suggest that the paucity of empirical research is the product of difficulties associated with creating testable hypotheses about precedent and the legal model that meet the scientific standard of “falsifiability.”\textsuperscript{29}

Another reason for the lack of empirical research is the resistance of the legal academy to the use of social science methodologies to study the work of judges. Choudhry and Hunter argue that “one of the great shortcomings of Canadian legal scholarship” is its failure to “engage with political scientists....”\textsuperscript{30} In recent years, empirical research conducted by American scholars has yielded mixed results on the influence of precedent, and the explanatory power of the legal model as a whole.

Research has shown that the judgments of the Canadian and U.S. Supreme Courts are replete with citations to, and arguments from, precedent-setting cases. This suggests, \textit{prima facie}, that precedent matters, at least to the Justices. For example, based on her analysis of the “interpretive resources” used by the U.S. Supreme Court during the 1996 Term, Schacter concluded that, “judicial opinions rank with statutory language as the most frequently cited resource.”\textsuperscript{31} In another study, Phelps and Gates conducted a content analysis of the written

\begin{footnotesize}
\begin{enumerate}
\item For an example of this skepticism, see Jeffrey A. Segal and Harold J. Spaeth, “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices,” \textit{American Journal of Political Science} 40, no. 2 (1996): 971 – 998. [hereinafter Segal and Spaeth, “The Influence of Stare Decisis,”]
\item Harold Spaeth and Jeffrey Segal, \textit{Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court} (New York: Cambridge University Press, 1999), 314. [hereinafter Spaeth and Segal, \textit{Majority Rule}]
\end{enumerate}
\end{footnotesize}
majority opinions of Justices Brennan and Rehnquist, and determined that over 80 per cent of
the constitutional arguments raised by both Justices were based on precedent.32

Similarly, in his analysis of the Supreme Court of Canada’s published judgments,
Peter McCormick found that the Justices referred to 1400 judicial decisions during the 2003
term, which was more than any other source.33 Other Canadian researchers have tried to
assess the “influence” of past and current members of the Supreme Court by statistically
analyzing case citation patterns.34 Moreover, the Court’s use of foreign precedents, especially
those of its American counterpart, has been the focus of considerable research.35 It is
apparent from this research that precedent is an important part of the “content” of judicial
decisions at the appellant level in Canada and the U.S.

While these studies show that judges frequently rely on precedent as an authority on
which to base their decisions, they do not demonstrate that precedent actually influences the
 justices’ votes. As Spaeth and Segal explain in their 1999 empirical study of precedent,
simply counting citations “turns stare decisis into a trivial concept, at least for explanatory
purposes.”36 After all, institutional norms require judges to justify their decisions with
precedents. Simply citing precedents does not necessarily mean that they are the “cause” of a
judicial decision. For their study, Segal and Spaeth defined “influence” as the ability to make
someone do something that they otherwise would not have done.37 Accordingly, a claim that

32 Phelps and Gates, 590.
33 Peter McCormick, “The Judges and the Journals: Citation of Periodical Literature by the Supreme Court
34 See generally, Peter McCormick, “The Supreme Court Cites the Supreme Court: Follow-Up Citation on
35 See generally, Christopher P. Manfredi, “The Use of United States Decisions by the Supreme Court of
499-518; S.I. Bushnell, “The Use of American Cases,” University of New Brunswick Law Journal 35
36 Spaeth and Segal, Majority Rule, 6.
37 Ibid., 23.
precedent influenced a decision requires that the decision be different from what would have been decided if the precedent did not exist.

To measure the “influence” of precedent on the U.S. Supreme Court, they examined the voting behaviour of dissenting judges in “landmark” cases and their “progeny.” Specifically, Segal and Spaeth operationally defined “precedential influence” as “the extent to which judges who disagree with a precedent move toward that position in subsequent cases.”38 A dissenting vote in a precedent-setting case is considered a judge’s “revealed preference,” because it is a manifestation of his or her preferred outcome.39 Thus, continuing to vote against the precedent in subsequent cases is considered “preferential” behaviour, while switching in favour of it is attributed to the influence of precedent. Although recognizing that other variables may be responsible for producing the observed change in judicial preference, Segal and Spaeth believe their approach provides a valid and reliable measure of the influence of precedent.

Based on a comprehensive examination of judicial voting behaviour throughout the Court’s history, Segal and Spaeth concluded that the Justices are “rarely influenced by stare decisis.”40 Of the 2425 votes in their data set, only 288, or 11.9 per cent, were classified as “precedential.”41 In their earlier research based on the same methodology, Segal and Spaeth found that the justices switched to the position established in the precedent from which they dissented a mere 9.2% of the time.42 Their data indicate that, with the exceptions of Stewart and Powell, the Justices votes were “overwhelmingly supportive” of their original

---

38 Ibid., 5.
40 Spaeth and Segal, Majority Rule, 288.
41 Ibid.
42 Segal and Spaeth, “The Influence of Stare Decisis,” 983.
preferences. In fact, the Justices voted consistently with their original preferences at a minimum rate of at least 80 percent.

In another study, Brenner and Spaeth examined the extent to which *stare decisis* influences the votes of Justices in cases where the U.S. Supreme Court has altered precedent. They assumed that when a judge votes to overrule or alter a precedent, his or her behaviour conflicts with the legal model. While acknowledging that some nonconformity to precedent is permissible under a “lax” policy of *stare decisis*, Brenner and Spaeth argue that they were “compelled to make this assumption in order to test the legal model.” Thus, a Justice conforms to the legal model by either voting with the majority in the altered decision and dissenting from its altering in a subsequent decision, or by dissenting in both the altered and altering decisions. Using this methodology, Brenner and Spaeth failed to uncover evidence in support of the position advanced by proponents of the legal model that precedent has a substantial influence on judicial decision-making. Taken together, these empirical studies indicate that precedent, which is a central component of the legal model, has limited influence on the decisions of the U.S. Supreme Court.

In the absence of empirical evidence, it is difficult to know with any certainty the extent to which Justices on the Supreme Court of Canada are influenced by precedent in their decision-making. However, there are reasons to expect that legal factors exert a similar degree of influence on American and Canadian judges. The first reason is that all judges are humans, meaning that they have individual values, attitudes, and tendencies, which are bound

---

43 Ibid.
44 Ibid.
46 Ibid.
to influence their decision-making. As Chief Justice McLachlin stated in a 2004 speech, 
"Judges are human. They are not living oracles." Her remark was intended to break down 
the idealized image of judges and show that judicial decision-making is governed by the 
same principles that affect all human decision-making.

Tversky and Kahneman have argued that when faced with a decision-making 
situation, individuals employ a "decision frame," which refers to the "decision-maker's 
conception of the acts, outcomes, and contingencies associated with a particular choice." Experimental research demonstrated that individuals will often rely on a biased "decision 
frame" by considering only those factors which support their preferred outcome. There is 
no reason to believe that judges are any more or less influenced by their psychological traits 
and biases than other individuals.

Another reason to doubt the explanatory power of the legal model is the inherent 
generality of statutory and constitutional language. Most legal terms, like ordinary words, 
have a range of possible meanings depending on the context within which they are used. 
However, the language used in many constitutional texts is particularly general and 
imprecise, which makes it extremely difficult for judges to agree upon a definition for terms 
such as "unreasonable search and seizure" or "cruel and unusual treatment." Chief Justice 
McLachlin has stated that "the broad, general language of the Charter permits a variety of 
interpretations and leaves judges no choice but to infuse their own values..." in deciding

49 Beverley McLachlin, "Judging in a Democratic State," Sixth Templeton Lecture on Democracy, 
University of Manitoba, 3 June 2004, online, available from http://www.scc-
csc.gc.ca/AboutCourt/judges/speeches/DemocraticState_e.asp. 
50 Amos Tversky and Daniel Kahneman, "The Framing of Decisions and the Psychology of Choice," 
51 Ibid.
This statement conflicts with the legalist position that legal texts have a "fixed" and "determinant" meaning.

Furthermore, the individual characteristics of judges combined with the indeterminacy of legal language may explain why judges regularly author separate opinions. According to the legal model, a group of judges should be able to examine the same facts, apply the same legal rules, and arrive at the same conclusion. However, as MacIvor has argued, "the frequency of dissenting (and concurring) opinions on the Supreme Court belies the suggestion that judges mechanically apply impartial rules of construction or precedential dogma." Nevertheless, the absence of empirical evidence makes it premature to completely discount the influence of legal factors on the decision-making of Supreme Court Justices in Canada.

2. The Strategic (Moderate) Model

Conversely, the strategic model of judicial behaviour holds that precedent does influence judges, in addition to other legal, institutional, and personal factors. In contrast to the legal model, which is predicated on the notion that legal rules (i.e. precedent) determine judicial preferences, the strategic approach maintains that precedent constrains judges' ability to vote according to their personal preferences. Proponents of the strategic model reject the mythological view of judging espoused by neo-legalists, preferring instead to consider judges as strategic actors who seek to maximize their own preferences. In attempting to maximize their preferences, judges are constrained by institutional rules and norms, as well as by the actions of other judges. While strategic scholars accept the attitudinalist position that

personal preferences are important, they point to the interaction of preferences with collegial choice, institutional norms, and opinion formation variables.\textsuperscript{56}

The intellectual antecedents of the moderate model are economic and social psychological theories predicated on the assumptions of human rationality and utility maximization. Glendon Schubert is widely regarded as the first social scientist to apply economic and social psychological models to the study of judicial behaviour. In his groundbreaking book, \textit{Quantitative Analysis of Judicial Behavior}, Schubert used game theory to analyze the decisions of Justices on the U.S. Supreme Court.\textsuperscript{57} At that time, game theory was relatively new in the social sciences, and was used almost exclusively to examine economic phenomena. Game theoretic models, such as the prisoner's dilemma, are used to predict the behaviour of rational actors in a specified decision-making environment. The goal of the actors is to obtain for themselves the "maximum share of utility consistent with the minimum risk of receiving a lesser or no share at all."\textsuperscript{58}

In two-player games, the interests of the actors are assumed to be in conflict; however, if there are more than two players, it is in the interests of two or more actors to cooperate and form a coalition in order to maximize their joint utility. Schubert argued that in order to maximize their utility, Supreme Court Justices had to first recognize their interdependency.\textsuperscript{59} Schubert was referring to the fact that appellate court judges need the support of other judges in order to form a majority coalition. Hence, their decisions depend, to a certain extent, on the decisions of other judges. Although many legal scholars initially criticized the use of game theory, Schubert's work is now regarded as "pioneering" for

\textsuperscript{56} Maveety, 193.
\textsuperscript{58} Ibid., 175.
\textsuperscript{59} Ibid.
having demonstrated that approaches based on the assumption of rationality could be applied to “important political problems,” including Supreme Court decision-making.60

Over the past three decades, a number of variations of the strategic approach have been developed which are based on the insights of Schubert’s early game theory research.61 The cooperative model is a variation of the strategic paradigm often associated with the work of Walter Murphy, which focuses on the dynamics of decision-making in a small group context. It theorizes that, “justices support stare decisis not because they normatively feel that they ought to, but because the long-term survival of their policy goals depends on it.”62

Judges at the appellate level seeking to establish or uphold a legal rule that reflects their preferred policy position need the support of other judges. Consequently, they might alter their preference to accommodate the preferences of other judges on the court.63 Appeals to pre-existing norms, such as precedent, can be an effective strategy for consensus building.

Scholars using strategic-choice models have theoretically demonstrated that, under certain conditions, judges may cooperate and respect precedents to ensure the survival of their policy goals.64 To illustrate how cooperative behaviour among policy-motivated judges could produce respect for precedent, consider the hypothetical case used by Spaeth and Segal, which involves two judges, called A and B. Suppose that a decision to overrule a precedent involves some loss in institutional prestige, and that the judges are risk averse.65

60 Lee Epstein and Jack Knight, “Walter F. Murphy: The Interactive Nature of Judicial Decision Making,” in Nancy Maveety, ed., The Pioneers of Judicial Behavior (Ann Arbor: University of Michigan Press, 2003), 203. Although this chapter is primarily about the work of Walter Murphy, it also discusses Schubert’s contributions to the field of judicial behavioral studies.
63 Spaeth and Segal, Minority Rule, 13.
64 Ibid.
65 Ibid., 14, citing Tversky and Kahneman, 453.
Under these conditions, A and B prefer to uphold a decision they agree with to overruling a precedent with which they disagree.\(^6\)

Alternatively, if the situation involved two precedents that will be overruled unless the judges cooperate, one favoured by judge A and the other by judge B, the model expects the judges to preserve the status quo, thereby upholding each other’s precedents. Thus, although judges may be motivated by their own preferences as to what the law should be, strategic scholars contend that the need for consensus building will cause them to modify their decisions in the direction of “rules established by existing precedent.”\(^6\)

The notion that group dynamics influence the behaviour of judges on appellate tribunals draws heavily on the work of social psychologists examining conformity, deviance, and leadership. Some strategic scholars have applied this research to study the process of collegial influence.\(^6\) Specifically, these researchers focus on the post-hearing conferences, the formation of opinion coalitions, and the role of the chief justice. They use memos and conference notes to gain insight into how judges make decisions and gain the support of other judges.\(^6\) According to Nancy Maveety, this group of strategic scholars, beginning with Schubert and Murphy, “added the importance of small-group, leadership, and interdependent decision-making factors in the explanation of judicial choice.”\(^7\)

The Justices on the Supreme Courts of Canada and the U.S. follow a similar process in forming their judgments. Justice Wilson’s description of the Supreme Court of Canada’s opinion formation process consists of four principal steps.\(^71\) The first step is the judges’

---

\(^6\) Ibid.


\(^6\) Maveety, 29.


\(^7\) Maveety, 193.

conference after every hearing, during which the judges express their tentative views on the case in reverse order of seniority, and decide who will draft the opinion or opinions.\textsuperscript{72} The conference will usually reveal "whether there is any prospect of unanimity or whether there is clearly going to be more than one judgment."\textsuperscript{73}

During the 1960s, Cartwright C.J. introduced the judges' case conference in an effort to reduce the number of multiple opinions issued by the Court. In addition to reducing the frequency of multiple opinions, former Justice L'Heureux-Dubé has stated that the case conference played a "key role...in improving relations among the judges."\textsuperscript{74} Perhaps more importantly, the requirement of face-to-face interaction during the case conferences provides judges with an opportunity to influence their colleagues.

The second stage involves the drafting of opinions and circulating them to the other judges. A judge will normally volunteer to author the first draft of the majority judgement or the Chief Justice will ask someone from the majority to do so.\textsuperscript{75} The draft is then circulated to the other justices at which point they "decide whether or not they are going to be able to concur."\textsuperscript{76} Stage three is when members of the panel exchange comments and suggest amendments to the draft, which the author is free to accept or reject. In an interview with the Globe and Mail, former Supreme Court Justice Peter Cory explained that when authoring majority opinions, it is common to receive memos from other justices which read, "I agree to A and to B, but not to C – and over my dead body to D."\textsuperscript{77} If a judge is unable to accept the draft reasons for judgment, he or she may propose a dissent, or author a concurring opinion. At stage four, the judges have read all of the opinions and must decide which one to join.

\textsuperscript{72} Ibid.
\textsuperscript{73} Ibid.
\textsuperscript{75} Wilson, 236.
\textsuperscript{76} Ibid.
It is clear from Justice Wilson’s description and Justice Cory’s comments that Supreme Court opinions reflect the need to accommodate the views of other justices through bargaining and compromise. Throughout the four stages, judges act strategically to influence the outcome of the case and the legal principles articulated therein. Based on their examination of the opinion formation process on the U.S. Supreme Court, Wahlbeck, Spriggs, and Maltzman concluded that, “the wording and scope of final majority opinions” reflects to a large extent the level of accommodation among the judges.78

The level of compromise on a court is affected by a number of factors, including the ability of the Chief Justice to “broker whatever compromises are necessary to produce a unanimous judgement,” or at least to reduce the number of concurring and dissenting opinions.79 In fact, chief justices are often evaluated based on their ability to generate clear, unanimous judgments in important cases.80 More importantly, strategic scholars argue that the dynamics of face-to-face interaction and peer influence affect the extent to which a court adheres to its own previous decisions.

Another variation of the strategic account maintains that judges follow stare decisis as a matter of institutional legitimacy. Commentators such as former U.S. Supreme Court Justice Lewis Powell Jr. argue that respect for precedent enhances the legitimacy of court rulings.81 Under this view, adherence to precedent contributes to the perception that judgments are based on law and not on arbitrarily imposed preferences, which is essential to maintaining the legitimacy of the judiciary. Canon and Johnson explain that a court decision

79 Maclvor, 101.
80 For example, see Peter McCormick, “Follow the Leader: Judicial Power and Judicial Leadership on the Laskin Court, 1973 – 1984,” Queen’s Law Journal 24 (1998): 237 – 277. McCormick concludes at pg. 265 that although Laskin was a frequent dissenter initially, he exercised “strong and decisive leadership over his court” in the last four terms.
is legitimate because the public "concedes that the institution's proper function in society to make such a decision and that the decision itself is not grossly biased or totally absurd."82 Hence, legitimacy does not require the public to accept or agree with a particular court decision.

Similarly, Knight and Epstein have argued that, in Justifying their rulings, judges must "choose from among a set of rules that the members of that society will recognize and accept."83 There are a number of "acceptable rules" which judges can use to explain their decisions, including statutory texts, canons of construction, and precedent. Consequently, judges use precedent to justify their decisions because *stare decisis* is regarded as an "acceptable rule" by the general public and legal community. Therefore, concern for the court's legitimacy may lead judges to abide by precedents, including those that conflict with their personal preferences.

Other commentators suggest that judges may abide by precedent to ensure the implementation of their decisions. Enforcing judicial decisions often requires the cooperation of other government actors, including Parliament, provincial legislatures, government departments or agencies, police, and lower courts.84 As McGuire and Stimson have noted, "while the Court is certainly not electorally accountable, those responsible for putting its rulings into effect frequently are."85 According to this argument, government officials seeking to be re-elected may refuse to implement unpopular judicial decisions, or those seen as illegitimate. For example, politicians and judges in some southern U.S. states refused to

84 Canon and Johnson, 26.
enforce the Supreme Court’s decision in *Brown v. Board of Education*, which ordered the desegregation of public schools across the country.\(^{86}\)

Murphy hypothesized that the need to ensure the implementation of their decisions may induce judges to follow precedents, or at least discourage them from overruling previous decisions. He argued that a court which frequently overruled or refused to adhere to its own decisions, “could not expect others to respect [those] decisions.”\(^{87}\) For these reasons, strategic scholars maintain that judges will abide by precedents to enhance the legitimacy of their rulings, thereby increasing the chance that they will be implemented properly.

Professional reputation is another reason offered by strategic scholars as to why judges follow precedent.\(^{88}\) In particular, the desire to have a reputation as a consistent, principled jurist may produce adherence to what Reed Lawler described as a policy of “personal *stare decisis*.”\(^{89}\) The traditional theory of *stare decisis* espoused by proponents of the legal model posits that the outcome of a case is independent of the deciding judge. It is therefore “impersonal.” In contrast, “personal *stare decisis*” recognizes that while “judges are often inconsistent with each other... each judge is consistent unto himself...”\(^{90}\) To maintain their own personal consistency, judges attempt to “show the logical link between the immediate decision and his or her past decisions.”\(^{91}\) It follows that more experienced judges will have a longer trail of past decisions to which they must conform.

In their previously discussed study of the influence of precedent in cases which altered precedent, Brenner and Spaeth also tested the influence of “personal *stare decisis*” on the votes of the Justices on the U.S. Supreme Court. Rather than conforming to the court’s

\(^{86}\) Maclvor, 126.
\(^{87}\) Murphy, Fleming, and Harris, 308.
\(^{88}\) See Schauer, “Incentives,” 618.
\(^{90}\) Ibid., 81.
established precedents, “personal stare decisis” occurs when a judge votes consistently with his or her previous decisions. For instance, if a judge dissents from the majority in a precedent-setting case, and dissents in a subsequent case that relied on the majority opinion from the original precedent, the judges’ behaviour conforms to “personal stare decisis.”

Brenner and Spaeth found that a majority of judges in their dataset demonstrated strong support for “personal stare decisis,” which may indicate that reputation is an important consideration. Specifically, all of the Justices included in their sample “manifested more support for personal stare decisis than for the legal model.” Thus, professional reputation is another reason advanced by supporters of the strategic model to explain why judges abide by precedents. It should be noted that although it is an eclectic model with numerous variations, compared to the legal and attitudinal models, the strategic approach provides perhaps the most accurate description of the judicial decision-making process.

3. The Attitudinal Model

In contrast to both the legal and moderate models, the attitudinal model posits that legal factors have virtually no impact on the decisions of Supreme Court Justices. According to the attitudinal model, the “facts of a case vis-à-vis the ideological values, attitudes, and preferences of individual justices provide the single best explanation for their votes.” The attitudinal approach to judicial behaviour rests on the theoretical insights of social psychology, the legal realism movement, and neo-institutionalism. However, testing the assumptions of the attitudinal model was not possible until the rise of behaviouralism in the social sciences following WWII and the corresponding development of new empirical methodologies.

92 Brenner and Spaeth, Stare Indecisis, 73.
93 Ibid., 85.
94 Segal, 33.
The legal realism movement, which emerged at the turn of the 20th century, challenged many of the basic assumptions on which the legal model rested. Early realists attempted to inject the “spirit of scientific investigation” into the study of law. For this reason, the legal realism movement has been described as the “first significant and visible intersection between applied social science and legal scholarship.”95 As Spaeth and Segal explain, the legal realists argued that the “reigning orthodoxy, [Blackstone’s] mechanical jurisprudence, poorly described what judges actually did.”96

This sentiment is evident in the works of the venerable American jurist Oliver W. Holmes, who is regarded by many as the father of legal realism. In his influential article, “The Path of the Law,” Holmes stated, “The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given [legal] system...can be worked out like mathematics....”97 In Holmes’s view, “the life of the law has not been logic: it has been experience.”98 Legal realists view law as an institution constantly in flux, and not as a set of stable propositions capable of being neutrally applied on a case-by-case basis.

The concern of realists is with what legal actors actually do, rather than what they say. Consequently, realists argue that judicial opinions citing precedent are merely post hoc rationalizations, not the cause of the decision itself.99 For realists, judicial opinions reveal only the “superficial and announced determinants of judicial decisions,” not the “real

96 Spaeth and Segal, Majority Rule, 16.
determinants” of those decisions. Proponents of realism complained that legal scholarship was overly concerned with studying the “announced determinants” of judicial decisions. This is reflected by the two main forms of legal research — theoretical and doctrinal — which Professor Schuck explains are representative of “almost the entire corpus of legal scholarship.” In order to uncover the “real determinants” of judicial behaviour, legal realists advocated the use of empirical methodologies to study the work of judges. Realists maintain that the failure to develop a tradition of empirical legal scholarship accounts for why so little is known of the “real determinants” of judicial behaviour.

Realists also challenge the notion that precedent “binds” future decision-makers, pointing out that judges can always find some aspect of the future case on which to “distinguish” it from the earlier one. Moreover, they argue that precedent is a superfluous doctrine, given that in any legal dispute, there are usually precedents capable of supporting both sides. Noted realist Max Radin described the rule of precedent as “an instrument capable of a great many variations and allowing movement in ways that have little obvious relation to the direction indicated in the precedent.”

In a similar vein, Holmes maintained that many of the components of the legal model, such as statutory language and precedent, could be used by judges to give almost “any conclusion a logical form.” Therefore, rather than a constraint, realists see precedent as concealing the considerable discretion exercised by judges in deciding cases. The modern attitudinal model has been heavily informed by the realist belief that legal rules, such as precedent, do not accurately explain judicial decisions.

100 Schauer, “Incentives,” 619.
103 Ibid.
105 Holmes, “The Path of the Law,” 466.
The attitudinal model has also been influenced by neo-institutionalist theories, which focus on how decision-making environments are shaped by institutional rules and structures. Specifically, the attitudinal model accepts the neo-institutionalist position that the degree of discretion exercised by judges is a function of their institutional environment. According to attitudinalists, Supreme Court justices are able to vote based on their personal values and preferences because they are not politically accountable, enjoy lifetime tenure, and control their own agenda.

Although these factors were initially developed to describe the environment of the U.S. Supreme Court, similar institutional rules make it possible to apply them to the Supreme Court of Canada. Under the terms of the *Supreme Court Act*, the Court is composed of a Chief Justice and eight puisne judges who are appointed by the Prime Minister and serve until the age of seventy-five. The Justices cannot be removed unless their conduct deviates from the statutory standard of “good behaviour.” To be eligible to serve on the Court, an individual must have been a provincial superior court judge or an attorney with at least ten years’ standing at the bar of a province. Furthermore, the Act prohibits justices from holding any other political office. Finally, with a few exceptions, the Supreme Court of Canada controls its own agenda. In sum, the institutional rules and structures governing the judicial system make it possible for the Justices on the Supreme Court of Canada to decide cases according to their ideological values and attitudes if they so choose.

Each of the approaches to judicial decision-making that have been discussed requires researchers to identify the preferences of individual judges. Because the attitudinal model expects judges to decide cases based on personal preferences, analysts must determine what

---

106 Segal, 29.

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
those preferences are before they can test whether they have any influence. The first scholar
to comprehensively test the attitudinal model, political scientist Glendon Schubert, developed
a method for determining judicial preferences by ordering the characteristics of a given case
and the judicial decision based on them along ideological dimensions. Schubert employed
scalogram analysis, also called cumulative scaling or Guttman scaling, which is a technique
used by psychologists to measure attitudes toward certain stimuli. An attitude is defined as an
“enduring syndrome of response consistency with regard to a set of social objects.” The
aim of cumulative scaling is to determine whether responses to stimuli are the result of a
single dominant attitudinal variable.

In order to illustrate Schubert’s application of cumulative scaling to judicial
behaviour, consider two police searches which involved nearly identical facts and uncovered
equally incriminating evidence. For this hypothetical scale, the attitudinal variable under
investigation is the justices’ attitudes toward search and seizure cases. Suppose, further, that
the police obtained a warrant for the first search but did not for the second. According to
Schubert, the first search is more protective of individual liberty than the second because a
warrant was obtained. For this reason, case 1 is considered “liberal” and should be placed to
the left of case 2 on the line representing ideological space. The justices who decide these
cases can also be placed along the ideological space. Due to their position in Figure 2.A,
justice A may be described as a liberal, B as a moderate, and C as a conservative.

109 Brenner and Spaeth, Stare Indecisis, 59.
111 This example is based on the ones used by Brenner and Spaeth, Stare Indecisis, 59-60; and Segal, 29.
112 Brenner and Spaeth, Stare Indecisis, 60.
Figure 2.A
Hypothetical cases and judges in ideological space

Justice A | Justice B | Justice C
Case 1 | Case 2


Schubert hypothesized that a judge “will vote to uphold any search to the left of his point in the space and void any search to his right.”\(^{113}\) Judge A will therefore vote in favour of the defendants in each case (and void the searches), while judge C will uphold the legality of both searches. However, if justice A voted against the defendant in case 2, that response is considered inconsistent and may be the result of an attitude other than the one under investigation.

Scales produce a measure called the “coefficient of reproducibility,” the size of which indicates the degree that an actual response pattern corresponds to that of a perfect scale.\(^{114}\) A coefficient of reproducibility of .90 suggests “unidimensionality” in a scale, meaning that the responses are likely the result of the hypothesized attitude.\(^{115}\) Suppose that in the above example justice A participated in a series of search and seizure cases, and voted consistently in favour of the “liberal” (defined as pro-defendant) position. If justice A’s scaled votes in these cases produced a coefficient of reproducibility of .90, it would be reasonable to conclude that justice A voted according to his or her attitude toward search and seizure cases.

Canadian scholars have used scalogram analysis to study the work of the Supreme Court since the mid-1960s. For example, in 1967 S. R. Peck examined the decisions of the

\(^{113}\) Ibid.
\(^{114}\) Schubert, 271.
Supreme Court from 1958 to 1966 in the areas of taxation, negligence, and criminal law.

Peck’s taxation scale produced a coefficient of reproducibility of .93, which indicates that the “justices reach their decisions on the basis of their attitudes to taxation.” Moreover, when the justices’ votes in taxation cases are dichotomously classified as either “pro-taxpayer” or “pro-government,” the scale demonstrated that Justice Cartwright consistently took a “pro-taxpayer” position, whereas Justices Abbott and Fauteux were the most “pro-government.”

In his contribution to Schubert and Danelski’s 1969 publication, Comparative Judicial Behavior, Donald Fouts constructed scalograms to assess the decisions of the Supreme Court from 1950 to 1960 in cases involving civil liberties, economic regulation, taxation, and labour-management relations. Fouts concluded that during the 1950s, the Supreme Court was generally “pro-economic liberalism” and slightly “anti-civil liberties.” Perhaps more significantly, Fouts’s data confirmed what many political scientists suspected, which is that the four Justices from Quebec (Taschereau, Fauteux, Rinftet, and Abbott) consistently voted together as a block in economic and civil liberties cases.

The validity of Schubert’s model and the other early cumulative scaling techniques used to identify judicial attitudes has been subject to considerable criticism. Because judges, unlike other political actors, are not disposed to reveal their values and attitudes, researchers must rely on their votes as “surrogates for those beliefs.” The problem, as Segal explains, is that “the measures for the independent and dependent variables are identical.” In other words, early versions of the attitudinal model were flawed because they

---

116 Peck, 684.
117 Ibid., 688.
119 Ibid.
employed circular reasoning. As Brenner and Spaeth note, "one cannot scientifically demonstrate that attitudes influence the votes when the attitudes are operationalized from these same votes."

To overcome the circularity problem, attitudinal researchers developed measures for judicial preferences that are independent of the votes they cast. A number of scholars use the past votes of judges to align them on an ideological scale similar to that developed by Schubert. Others argue that this approach falls short because attitudes are still being operationalized from the justices' votes. Nevertheless, researchers have demonstrated that past votes are "excellent predictors" of future behaviour in certain types of legal disputes. As a truly independent measure of ideology, content analysis of materials produced by, or about, a particular judge, including published works, speeches, and newspaper editorials, has proven effective. Relying on this methodology, Segal and Cover found a robust correlation of .80 between their measure of attitudes and the U.S. Supreme Court's decisions in civil liberties cases.

Considerable research has been undertaken in recent years on the decision-making patterns of individual Justices on the Supreme Court of Canada. Although most of this research is not explicitly designed to test the attitudinal model, some studies have found evidence in support of its fundamental propositions. In particular, the work of F.L. Morton and others has focused on the Justices' attitudes toward different Charter rights and classes of Charter litigants. They constructed two indices: a "legal rights" index which included only cases implicating sections 7-14 of the Charter or which involved some other section but

122 Ibid.
123 Brenner and Spaeth, Stare Indecisis, 63.
124 Epstein and Mershon, 264.
125 Ibid.
126 Ibid.
pertain to a criminal law issue; and a “Court Party” index. Morton, Russell and Riddell used the “Court Party” index to measure the Judges’ support for “Court Party” issues and/or groups. An index, which is similar to a scale, simply involves accumulating scores that are assigned to individual attributes. Thus, the legal rights index is constructed by tabulating how often each justice votes in favour of or against a claim involving legal rights.

Using the Justices’ past votes from all applicable Charter cases decided from 1982 to 1992, Morton and others found that the voting behaviour of certain members of the Court varies considerably from one index to the other. Former Justice L’Heureux-Dubé’s decisions illustrate this point well: she was found to have the second lowest rate of support for Charter claimants in criminal law cases, and the second highest support rate for the “Court Party.” In terms of her ideological position relative to the other Justices, L’Heureux-Dubé J. would be placed on the “left wing” of the Court for the “Court Party” cases, and on the “right wing” for criminal rights cases.

In another study designed to test the attitudinal model, the researchers concluded that Justice L’Heureux-Dubé’s opinions reflect a “communitarian orientation” which emphasizes two broad themes: “(1)... the protection of society from criminal offenders; and (2)... an ethic of care for groups facing discriminatory treatment or harm.” They also determined that from 1991 to 1995, the Court was dominated by three attitudinal conflicts: communitarianism versus libertarianism; the due process rights of criminals versus the need to protect society;

---

130 Morton et al, 47.
and judicial activism versus judicial restraint.\textsuperscript{133} Taken together, these studies suggest that the Justices hold various attitudes towards Charter rights. As Andrew Heard argued in 1991, a consequence of these divergent judicial attitudes, combined with the use of five- and seven-judge panels, is that the outcome of Charter cases depends in large part on which Justices hear the appeal.\textsuperscript{134} However, the use of such panels is much less common today than it was ten years ago.

Other researchers have examined the connection between the personal attributes of judges and their voting behaviour. Personal attribute approaches use the background and demographic characteristics of individual judges to explain past voting behaviour, and to predict how they will vote in future cases.\textsuperscript{135} It should be noted that although personal attribute approaches are considered distinct from the attitudinal model, they share the assumption that personal attitudes account for judicial behaviour. Background characteristics are not seen as the cause of judicial decisions, but rather as useful to explaining the formation of particular attitudes. Variables including gender, race, religion, and education (prestige of schools) have, in some instances, proven to be highly effective at predicting future behaviour.\textsuperscript{136}

For example, the personal attribute models developed by Neal Tate were able to account for a considerable 70 to 90 percent of the variance in the voting behaviour of postwar U.S. Supreme Court justices in decisions concerning civil rights and liberties, and economics.\textsuperscript{137} In 1989, Tate and Sittiwong applied the personal attribute model to the members of the Supreme Court of Canada who sat between 1949 and 1985. They found

\textsuperscript{133} Ibid.
\textsuperscript{135} Epstein and Knight, 206.
\textsuperscript{136} See Heise, 834 at note 73.
strong indications that religion, region of origin (especially Quebec/non-Quebec), appointing prime minister, political affiliation, and length of judicial experience were correlated to the judge’s voting behaviour in civil rights and liberties and economic cases.\textsuperscript{138} Other research has highlighted the distinctive voting behaviour of female Supreme Court Justices in certain types of cases.\textsuperscript{139} Most importantly, researchers using attitudinal and personal attribute models have empirically demonstrated the salience of non-legal factors in the judicial decision-making process.

In summary, Canadian and American research has convincingly established that personal attitudes, preferences, and attributes are useful in both predicting and explaining the voting behaviour of Supreme Court Justices. Notwithstanding problems related to the empirical tests and measures, Segal explains that, “even critics of the attitudinal model have conceded its exceptional explanatory ability.”\textsuperscript{140} Alternatively, the few studies that have quantitatively examined the propositions of the legal model, have found at best limited evidence to support the conventional wisdom that precedent influences judicial decision-making. While content analyses have found that judges frequently cite and appeal to precedent in their opinions, justifying decisions with previous cases is not the same as being influenced by them.

Notably absent from the existing literature is research examining factors associated with the legal model, and the influence they may have on the Justices of the Canadian Supreme Court. The proposed study will attempt to fill the void in the existing body of literature by comprehensively examining whether precedent (a component of the legal model) has any influence on the decisions of the Supreme Court Justices. Specifically, the

\textsuperscript{140} Segal, 33.
research will be undertaken in three stages: a content analysis of the Court's written opinions; application of the methodology used by Brenner and Spaeth to test the influence of precedent in cases which alter precedent; and application of Segal and Spaeth’s methodology for measuring precedential influence.

4. Hypotheses

Based on the Supreme Court of Canada’s jurisprudence and the findings of previous research, the study hypothesizes:

1. Supreme Court Justices will invoke arguments based on precedent more than arguments from other sources in their written opinions.

2a. The majority of Supreme Court Justices will exhibit low levels of support for “institutional” stare decisis (33 percent or less), and moderate to high levels of support for “personal” stare decisis (34 percent and above).

2b. The Court as a whole will exhibit a low level of support for “institutional” stare decisis (33 percent or less), and moderate to high levels of support for “personal” stare decisis (34 percent and above).

3a. The majority of Supreme Court Justices will exhibit weak levels of “precedential behaviour” (33 percent or less), and strong levels of “preferential behaviour” (68 percent and above).

3b. The Court as a whole will exhibit a weak level of “precedential behaviour” (33 percent or less), and a strong level of “preferential behaviour” (68 percent and above). 141

141 The cut-off points are the same as used in Segal and Spaeth, Majority Rule, 21 – 22.
CHAPTER 3
Methodology

1. Content Analysis

The first hypothesis is that the Court will frequently invoke arguments from precedent in its opinions, relative to arguments from other sources. To test this expectation, a content analysis will be conducted of the Court’s published opinions from the 2004 term.¹ Similar to the approach used by Phelps and Gates, each paragraph of an opinion will be a separate unit of observation.² The name of the Justice who wrote each opinion will be recorded, as well as whether the opinion was written for the majority, concurring with the majority, or dissenting.

Each paragraph from those opinions is then assigned to one of nine straightforward categories, seven of which represent a different “mode of argument.”³ In justifying their decisions, judges employ various “modes of argument” such as precedent and scholarly materials. Presumably, each paragraph will contain one “mode of argument.” Paragraphs will be classified according to whether the argument is based on: statutory/constitutional text, legislative materials, precedent, scholarly materials, intervener submissions, social science evidence, or “higher law” sources. Note that the first three “modes” are aspects of the legal model, while some of the remaining categories comport with the features of the attitudinal model. Thus, it is also possible to combine the variables associated with the legal model and calculate the frequency of arguments based on legal rules.

¹ The cases will be obtained from the Supreme Court’s online database at, http://lexum.umontreal.ca/csc-scc/en.html.
² Glenn A. Phelps and John G. Gates, “The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan,” Santa Clara Law Review 31, no. 2 (1991): 586. As the authors explain, based on the conventions of English usage, a paragraph “should be thematically unified and express one central idea.” As such, each paragraph should contain only one primary “mode of argument.”
³ Ibid., 587.
Textual arguments are those based on the specific language of an international treaty, or constitutional/statutory provision. References to the Interpretation Act, which provides guidance to the courts regarding the interpretation of statutes, are classified as textual arguments. The category also includes references to dictionaries since they are used to assist in determining the meaning of a text.

Arguments based on legislative materials are those which rely on statements made by legislators during debates, and committee reports. They are usually used by the Court to ascertain the purpose or intent of a constitutional/statutory provision. Although the Supreme Court has warned that such materials should be given “minimal weight” in the context of Charter interpretation, the Court continues to consult legislative materials in its statutory jurisprudence and occasionally in Charter cases.

Arguments based on precedent include any instance in which the Court uses case law: its own decisions, those of federal and provincial courts, and/or the decisions of foreign courts. However, the precedent category does not include paragraphs discussing the judicial history of the particular case that the Supreme Court is considering.

A category has been created for arguments based on scholarly materials such as textbooks and periodicals. Until relatively recently, the Supreme Court followed a policy which discouraged referencing living authors. However, today scholarly materials are regularly used by the Justices to support their decisions.

Conversely, “higher law” arguments invoke principles that, while not necessarily derived from textual sources, are considered implicit in the structure or history of the Canadian legal system. Moreover, appealing to the concept of “natural justice,” or natural

---

4 Canadian Legal Information Institute, Interpretation Act, R.S. 1985, c. 1-23, s. 1, online, available from http://www.canlii.org/ca/sta/i-21.
5 Ref. Re. s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486, par. 52.
law, is an example of an argument based on a “higher law” source.\(^7\) An excellent example of the use of “higher law” sources occurred in *Re Secession of Quebec*, where the Court’s decision-making was guided by certain “underlying constitutional principles: federalism, democracy, constitutionalism, the rule of law, and respect for minority rights.”\(^8\) Finally, the use of constitutional values to justify a non-constitutional decision is considered a “higher law” source.

An additional category has been included to classify paragraphs that discuss the facts of a case and its litigation history.\(^9\) It also includes paragraphs that simply state the questions raised by the appeal. A category was also created for paragraphs that do not fit into one of the other modes of argument. Furthermore, because most cases raise more than one issue, the analysis will indicate whether the “object” of the mode of argument within each paragraph is constitutional, statutory, or other.

Based on the results of the content analysis, it will be possible to identify the mode of argument which the Justices employ most frequently in their opinions. Moreover, the data will be examined to determine whether any relationships can be detected between judges and “modes of argument,” and between “mode of argument” and case type. The results are expected to show that the Court employs arguments from precedent with greater frequency than any other source.

### 2.1 The Characteristics of Precedent Altering Decisions

The second stage of the research examines the influence of precedent on the votes of the Justices on the Supreme Court of Canada in cases which alter precedent. It will be divided into two parts: the first describes the characteristics of precedents altered by the

---


\(^9\) Phelps and Gates, 578.
Supreme Court since 1950; the second part assesses the influence of precedent on the votes of the Justices in cases that alter precedent. The choice to use cases which “alter” rather than “overrule” precedent was made to ensure an adequate sample size. As noted earlier, the Supreme Court rarely issues decisions that explicitly overrule a precedent. Consequently, using only cases that formally overrule a precedent would severely limit the number of cases included in the sample.

Part one requires compiling a list of cases in which the Court has altered its own precedents or those established by the JCPC or House of Lords. Although the Court frequently “alters” the direction of the law in a particular area, this study is concerned only with cases which substantially alter a principle or rule of law articulated in a previous decision. Identification of precedent-altering decisions relies primarily on a statement in the Court’s majority or plurality opinion that the decision alters one or more precedents. This should reduce the subjectivity involved in determining what constitutes a precedent-altering decision.

There are a number of ways that the Court can alter precedent. The clearest example of altering precedent occurs when the Court overrules a prior decision. In some cases the Court will clearly indicate that it is overruling a precedent in the section near the beginning of each judgment titled “cases cited.” However, there are examples of the Court overruling a precedent without acknowledging it under the “cases cited” heading. In some instances, the Court overrules a precedent but does not explicitly admit to it until a subsequent decision.

---

11 For example, see Wells v. Newfoundland [1999] 3 S.C.R. 199.
12 In *U.S. v. Burns*, [2001] 1 S.C.R. 283, the Court overruled its decisions in *Kindler v. Canada*, [1991] 2 S.C.R. 779 and *Ref. Re Ng*, [1991] 2 S.C.R. 858. However, these cases were listed under the “cases cited” heading as “explained” rather than “overruled.”
Sometimes the Court will list a precedent as “not followed,” or “distinguished,” which alone is not enough to be classified as a precedent altering decision. To be considered precedent-altering, the Court must say that a precedent has not been followed or distinguished, accompanied by a statement to the effect of, “this decision is no longer good law,” or “can no longer be regarded as controlling.”13 The Court can also alter precedent by refusing to apply the majority judgment from an earlier decision. In addition to reading the Court’s decisions, scholarly materials, including textbooks and periodical literature, will be used to aid in the identification of precedent-altering decisions. While the list of altering and altered precedents does not purport to be exhaustive, it does provide a fairly comprehensive picture of how the members of the Supreme Court approach the doctrine of *stare decisis* in their precedent-altering judgments.

The characteristics of the altering and altered precedents are then entered into an SPSS database. Each decision is identified in the database by name, citation, and year as listed in the Supreme Court Reports or the Dominion Law Reports. For each precedent altering decision, the presiding Chief Justice is recorded. Specifically, they are given a value from one to nine, which represent all of the Chief Justices that have served since 1950. The values are as follows: (1) Rinfret; (2) Kerwin; (3) Taschereau; (4) Cartwright; (5) Fauteux; (6) Laskin; (7) Dickson; (8) Lamer; (9) McLachlin.

The votes from the precedent-altering decisions are coded into one of three categories which represent different levels of agreement among the Justices. The “high level of agreement” category includes unanimous (or eight-to-one) decisions to alter precedent.14 Justices express “moderate levels of agreement” in decisions decided by votes of: seven-to-

---

13 In Bell v. The Queen, [1979] 2 S.C.R. 212, the Court stated that it was “no longer bound by the decision in City of Toronto v. Polai, [1973] S.C.R. 38,” even though the decision was listed as “distinguished” in the “cases cited” section of the judgment.
one, seven-to-two, six-to-one, six-to-two, five-to-one, and five-to-two.\textsuperscript{15} Alternatively, a low level of agreement occurs when the vote is five-to-four, five-to-three, six-to-three, and three-to-two.\textsuperscript{16} Moreover, the court that decided the altered precedent is coded as either: (1) the Supreme Court of Canada; or (2) English Court, which includes the JCPC, House of Lords, and the English Courts of Appeal. Precedents established by lower or foreign courts other than the “high courts” of England are omitted since the Supreme Court is not, and has never been, “bound” to follow them.

The Chief Justice at the time the altered precedent was decided is recorded. Although the list of Chief Justices for the precedent-altering decisions only includes those who have served since 1950, the list for the altered decisions includes every Chief Justice since the Court was founded in 1875. The values for Chief Justice are as follows: (1) Richards; (2) Ritchie; (3) Strong; (4) Taschereau; (5) Fitzpatrick; (6) Davies; (7) Anglin; (8) Duff; (9) Rinfret; (10) Kerwin; (11) R. Taschereau; (12) Cartwright; (13) Fauteux; (14) Laskin; (15) Dickson; (16) Lamer; (17) McLachlin. An additional value of 18 (“not applicable”) was added to account for altered English court precedents.

The altered precedents were further organized according to age. Altered precedents are placed into one of five age-ranges. The first category includes all decisions that are less than ten years old; the second includes decisions eleven to twenty years old; category three is for decisions between twenty-one and thirty years of age; the fourth category includes judgments that are thirty-one to forty years old; and the fifth category includes decisions forty-one years and older. Moreover, the actual age of the altered precedents is recorded.

Finally, the Court’s stated reason for altering the precedent is recorded into one of ten categories. Most of the categories correspond to the reasons for altering precedent identified

\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid., 33.
by the Supreme Court in *Bernard*, *Chaulk*, *B. (K.G.)*, and *Robinson*. While the Court frequently offers more than one justification for altering a precedent, this study is concerned with identifying the single most salient reason. Determining what constitutes the “most salient reason” involves selecting the one reason emphasized and relied on most heavily by the Court in justifying the alteration of precedent. In other words, the researcher must ask, “would the court have altered precedent in the absence of the particular reason?” If the likely answer is “no,” the reason may be considered the “most salient.”

The reasons for altering precedent are as follows: (1) the Court is no longer bound by the decisions of the JCPC; (2) the introduction of the Charter requires the Court to alter its jurisprudence in certain areas; (3) Parliament has enacted a law in response to a common law or statutory precedent; (4) a particular area of law or doctrine needs to be updated; (5) the altered precedent was wrongly decided; (6) the altered precedent was “unworkable” or created uncertainty for lower courts and others to which it applied; (7) the altered decision has been attenuated by subsequent Supreme Court decisions; (8) the altered decision has the effect of expanding criminal liability; (9) the altered decision has been the subject of scholarly criticism. An additional category, “(10) other,” has been included for reasons which do not fit into one of the nine categories.

Based on these data, it will be possible to empirically examine and describe the characteristics of altering and altered Supreme Court decisions. Specifically, the data will reveal whether there are any patterns or trends in how the Court alters precedent. Part two of Section two uses the list of altering and altered decisions to test the influence of precedent on the Justices’ votes in cases which alter precedent. It follows a methodology similar to that

---

used by Brenner and Spaeth in their examination of the influence of precedent on the U.S. Supreme Court in cases which overrule precedent.

2.2 The Influence of Stare Decisis in Precedent Altering Decisions

To test the influence of precedent as an aspect of the legal model, the present examination assumes that a vote to alter precedent conflicts with the legal model.21 Although some nonconformity is permissible under a “lax” version of the doctrine of precedent, Brenner and Spaeth explain that such deviations are “considered unusual, and defenders of the legal model do not present explicit guidelines about when it is appropriate to abandon stare decisis.”22 The units of analysis are the votes of Justices that participated in both the altered and altering decisions.

Furthermore, testing the influence of precedent requires distinguishing between “institutional” and “personal” stare decisis. The former takes place when a Justice “conforms” to the Court’s precedents; the latter occurs when a Justice votes consistently with his or her past votes. The legal model demands adherence to “institutional” stare decisis, whereas the strategic model expects the “personal” form to dominate. However, it should be noted that adherence to “personal” stare decisis may indicate that a justice is voting based on a set of personal attitudes toward the issues raised, which would be consistent with the attitudinal model. According to these criteria, four possible voting patterns may emerge:

1. A justice may vote with the majority in the altered case and dissent in the altering decision. This voting behaviour is consistent with both “institutional” and “personal” stare decisis.
2. A justice may dissent in the altered case and vote with the majority in the altering decision. This behaviour conforms to “personal” stare decisis while rejecting “institutional” stare decisis.
3. A justice may vote with the majority in the altered and altering cases. This behaviour conforms to neither “institutional” nor “personal” stare decisis.

---

21 Brenner and Spaeth, Stare Indecisis, 73.
22 Ibid.
4. A justice may dissent in both the altered and altering decisions. This behaviour conforms to “institutional” stare decisis, but not to “personal” stare decisis.\textsuperscript{23}

To determine the influence of “institutional” stare decisis on the individual justices and the Court as a whole, I divide the total number of votes compatible with the legal model by the number of pairs of altered and altering decisions. Each pair of decisions (i.e. the altered and altering) which a justice participates count as one. Thus, if justice A participates in two pairs of decisions and votes to oppose the alteration of precedent in one pair, he or she voted compatibly with the legal model 50 percent of the time. The same formula is used to calculate the level of support for “personal” stare decisis. Scores between 0 and 33 percent correspond to a low level of support for either “institutional” or “personal” stare decisis. Moderate support occurs between 34 and 67 percent, while a score of 68-100 percent represents a high level of support.

3. The Influence of Stare Decisis in all Cases since 1950

The third stage of the research will assess whether precedent actually influences the decisions of the Justices on the Supreme Court. Specifically, it is hypothesized that the Justices will demonstrate a weak level of “precedential behaviour.” In order to test this prediction, Segal and Spaeth’s methodology will be applied to the Supreme Court of Canada. Precedential influence will be measured by focusing on Justices who opposed the establishment of a precedent. Since their “original preferences” conflict with the precedent, Spaeth and Segal argue that if they subsequently support the precedent, a “strong assumption” can be made that the established precedent influenced their vote.\textsuperscript{24}

Sampling for this type of analysis raises a number of practical issues. In compiling their list of precedent setting cases and “progeny,” Segal and Spaeth had the benefit of using

\textsuperscript{23} Ibid.
\textsuperscript{24} Harold Spaeth and Jeffrey Segal, \textit{Majority Rule or Minority Will: Adherence to Precedent on the U.S. Supreme Court} (New York: Cambridge University Press, 1999), 23. [hereinafter Spaeth and Segal, \textit{Majority Rule}]
previously compiled data supplemented by information from legal indices. The present research will use the Supreme Court Reports to identify the non-unanimous precedent setting decisions of the Supreme Court of Canada. However, identifying progeny—“decisions subsequent to the precedent whose issue(s) and factual circumstances closely resemble those of the precedent itself”—requires the researcher to carefully read and group the progeny cases with the applicable precedent.\(^{25}\) To aid in this process, scholarly writings, including law review articles and legal texts, will be consulted.

Furthermore, to ensure an adequate sample size, while also keeping the research manageable, this study will include only those precedent-setting cases and progeny decided since 1949. The selection of 1949 as the cut-off point is logical, because in that year appeals to the Judicial Committee of the Privy Council were abolished and the Supreme Court of Canada became the nation’s principal judicial authority.

As previously noted, this study will use Spaeth and Segal’s operational definition of “precedential influence,” which is “the extent to which justices who disagree with a precedent move toward that position in subsequent cases.”\(^{26}\) The dissenting vote in the precedent-setting case is considered the judge’s “revealed preference;” subsequent votes in progeny cases that are consistent with the original vote to dissent are recorded as “preferential.” In other words, the judge continues to vote according to his or her preferences. Conversely, if a judge who dissents from a precedent subsequently changes their vote in a progeny of that precedent, the behaviour is recorded as “precedential.”

Although vote switching by the Justices of the Supreme Court is a relatively uncommon occurrence, it has been known to happen. For example, during the 1987 Term, Justice Estey dissented in the first of a series of cases dealing with the application of section

\(^{25}\) Ibid., 25.
\(^{26}\) Ibid., 5.
11 of the Charter, but agreed with the majority in the remaining three. In *Wigglesworth*, Estey J. dissented from the majority, arguing that section 11(h) of the Charter applied to police disciplinary hearings.27 However, he sided with the majority in three progeny cases which were explicitly based on the majority’s reasoning in *Wigglesworth*.28 Thus, under Spaeth and Segal’s coding conventions, Justice Estey’s votes in the *Wigglesworth* progeny are considered precedential; that is, his subsequent votes conform to established precedents rather than his original revealed preferences.

As Spaeth and Segal note, there are different levels, or “manifestations” of precedential and preferential behaviour, “that might properly be considered an ordinal scale.”29 Specifically, they divide precedential behaviour into three exclusive categories: weak, moderate, and strong. “Strong precedential” behaviour occurs when a judge “formally accedes” to the precedent in a written opinion.30 “Moderate precedential” behaviour occurs when a judge joins or writes an opinion that “specifically supports and cites” the precedent as an authority for their vote.31 Justice Estey’s vote for the majority opinion in *Trumbley*, which explicitly cites *Wigglesworth*, is an excellent illustration of “moderate precedential” behaviour. A dissenting judge can also accede to a precedent without saying so, by voting in a progeny compatibly with the (ideological) direction of the decision in the precedent, which is defined as “weak precedential behaviour.”32

There are also varying levels of preferential behaviour, which takes place when a judge continues to dissent in progeny cases. “Weak preferential” behaviour occurs when a

---

29 Spaeth and Segal, *Majority Rule*, 35.
30 Ibid., 35.
31 Ibid.
32 Ibid., 36.
dissenter joins or writes an opinion opposite in direction from that of the precedent. For example, a vote against a criminal rights claim is considered "conservative." If the judge continues to oppose similar criminal rights claims, without referring to his or her dissent in the original case, the judges' votes are consistent with "weak preferential" behaviour.

"Moderate preferential" justices will support their original position by dissenting from, or concurring with the opinion in a progeny that cites the precedent as authority. Conversely, "strong preferential" judges continue to oppose the precedent, by either explicitly saying so, or by citing their dissent from the precedent as an authority.

For each dissenting judge, the number of preferential and precedential votes in progeny cases are totalled, and assigned to one of the six aforementioned categories representing degrees of precedential and preferential behaviour. Dividing the votes in the "strong," "moderate," and "weak" precedential categories by the judge's total number of precedential votes, produces a percentage total for each category. The same process is repeated for the preferential voting categories, as well as for all of the judges' votes combined.

To determine the overall level of precedential support for each judge and the Court as a whole, Spaeth and Segal's "cut-off points" will be used. On this scale, 0-33 percent is considered a weak level of precedential support, 34-67 percent is moderate, and 68-100 percent is a strong level. Thus, a score of 30% means that the judge, or Court, exhibits a weak level of precedential behaviour. In other words, precedent has very little influence. This result would be consistent with the attitudinal model, whereas a score of 75% would be consistent with the legal model.

---

33 Ibid.
34 Ibid., 37.
35 Ibid.
36 Ibid., 21-22.
CHAPTER 4

Results and Discussion

The first stage of the current research is based on a content analysis of the published judgments of the Supreme Court of Canada from 2004. All of the judgments reported on the Supreme Court’s website for that year were included.1 This results in a sample of eighty-two cases; however, two cases were excluded because the reasons for judgment were not reported on the Court’s website.2 Some of the more noteworthy decisions from that year include a case dealing with the right of parents to physically discipline their children (also known as the “spanking case”)3, a decision relating to the Air India bombing,4 and the same-sex marriage reference.5

The 80 cases produced a total of 5112 paragraphs, for an average of 63.9 paragraphs per opinion. Not surprisingly, the aforementioned “spanking case,” which is perhaps the most divisive case the Court dealt with in 2004, produced the most paragraphs at 246. Four judgments tied for having the fewest number of paragraphs at 1. In terms of the opinion type, 4001 (78.3 percent) of the paragraphs were part of majority opinions, 105 paragraphs (2.1 percent) were part of concurring opinions, and 696 (13.6 percent) were part of dissenting opinions. In addition, 41 paragraphs (0.8 percent) were classified as partial concurrences, and 269 paragraphs (5.3 percent) were partial dissents.

---

1 See Appendix A for the list of cases used in the content analysis.
Table 4.1
Paragraph Author Frequency

<table>
<thead>
<tr>
<th>Justice</th>
<th>Frequency</th>
<th>Percent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>McLachlin</td>
<td>613</td>
<td>12.0</td>
</tr>
<tr>
<td>Gonthier</td>
<td>76</td>
<td>1.5</td>
</tr>
<tr>
<td>Major</td>
<td>382</td>
<td>7.5</td>
</tr>
<tr>
<td>Bastarache</td>
<td>540</td>
<td>10.6</td>
</tr>
<tr>
<td>Binnie</td>
<td>1002</td>
<td>19.6</td>
</tr>
<tr>
<td>LeBel</td>
<td>705</td>
<td>13.8</td>
</tr>
<tr>
<td>Deschamps</td>
<td>432</td>
<td>8.5</td>
</tr>
<tr>
<td>Arbour</td>
<td>307</td>
<td>6.0</td>
</tr>
<tr>
<td>Fish</td>
<td>533</td>
<td>10.4</td>
</tr>
<tr>
<td>Iacobucci</td>
<td>430</td>
<td>8.4</td>
</tr>
<tr>
<td>Charron</td>
<td>8</td>
<td>0.2</td>
</tr>
<tr>
<td>The Court</td>
<td>84</td>
<td>1.6</td>
</tr>
<tr>
<td>Total</td>
<td>5112</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Table 4.1 presents the number of paragraphs authored by each of the eleven Justices who participated during 2004, as well as a category for those opinions signed by "The Court." Five of the Justices combined to author approximately two-thirds of all the paragraphs. As Table 4.1 shows, Justice Binnie authored 1002 paragraphs (19.6 percent), which was more than any other member of the Court in 2004. Justice LeBel authored the second highest number of paragraphs at 705 which represents 13.8 percent of all the paragraphs included in the sample. Chief Justice McLachlin was third with 613 paragraphs (12 percent), followed by Justices Bastarache and Fish, who authored 540 (10.6 percent) and 533 (10.4 percent) paragraphs respectively. Justice Charron, one of the newest members of the Court, authored the least number of paragraphs, with 8 or .2 percent of the total number of paragraphs from 2004.

Justice Binnie authored the greatest number of majority opinion paragraphs with 796. The Chief Justice is second at 568 majority paragraphs, followed by Justice Fish with 431
and Justice Iacobucci with 430. Justice LeBel authored 53 concurring paragraphs and 159 dissenting paragraphs which is more than any other Justice in either category. The second most frequent dissenter measured by number of paragraphs is Justice Bastarache at 152, while Justice Binnie was third with 135 dissenting paragraphs.

Table 4.2 presents the seven modes of argument and the number of times the Court invoked each in its judgments from 2004. It shows that slightly more than one-quarter (27 percent) of all paragraphs were devoted to explaining the background and litigation history of the cases. This is to be expected, as the case facts are regarded as important by all three of the models of judicial decision-making discussed in Chapter Two. An additional 26.1 percent of the paragraphs were classified as "Other," meaning that they did not rely on any of the modes of argument included in the analysis. Most of the paragraphs coded as "Other" were either instances in which the author applied the law to the facts of the case being considered, addressed an argument raised by another Justice in the same case, or paragraphs containing the disposition of the case.

Table 4.2
Frequency of Mode of Argument

<table>
<thead>
<tr>
<th>Mode of Argument</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case Background</td>
<td>1380</td>
<td>27.0</td>
</tr>
<tr>
<td>Constitutional/Statutory Text</td>
<td>834</td>
<td>16.3</td>
</tr>
<tr>
<td>Legislative Materials</td>
<td>63</td>
<td>1.2</td>
</tr>
<tr>
<td>Precedent</td>
<td>1283</td>
<td>25.1</td>
</tr>
<tr>
<td>Scholarly Materials</td>
<td>161</td>
<td>3.1</td>
</tr>
<tr>
<td>Briefs</td>
<td>10</td>
<td>.2</td>
</tr>
<tr>
<td>Social Science</td>
<td>26</td>
<td>.5</td>
</tr>
<tr>
<td>Higher Law Sources</td>
<td>21</td>
<td>.4</td>
</tr>
<tr>
<td>Other</td>
<td>1334</td>
<td>26.1</td>
</tr>
<tr>
<td>Total</td>
<td>5112</td>
<td>100.0</td>
</tr>
</tbody>
</table>
The data in Table 4.2 confirm the initial hypothesis that the Court invokes arguments based on precedent more frequently than any other source. Specifically, the Court referred to precedents in 1283 paragraphs, which represents 25.1 percent of the total number of paragraphs. The next most frequently used mode of argument are those based on the wording of statutory and constitutional texts. The Court relied on arguments from textual sources in 834 (16.3 percent) of the paragraphs. The Court referred to scholarly materials in 161 paragraphs, which represents 3.1 percent of the total number of paragraphs. Legislative materials such as Parliamentary debates and committee reports were used by the Court in 1.2 percent of the paragraphs, followed by social science evidence at .5 percent, higher law sources at .4 percent, and briefs were the least used mode of argument at .2 percent.

Considered alone, the Court’s use of precedent to justify its decisions suggests that legal factors are an important part of judicial decision-making. However, the salience of legal factors appears even greater when the variables associated with the legal model are combined and compared to the variables associated with the attitudinal model. The three variables (modes of argument) associated with the legal model are constitutional/statutory texts, legislative materials, and precedent. The Court referred to variables associated with the legal model in 2180 paragraphs, which, as the pie chart in Figure 4.A illustrates, represents 42.6 percent of the total number of paragraphs. When combined, the variables associated with the attitudinal model, including scholarly materials, briefs, social science evidence, and higher law sources, were invoked in a mere 218 or 4.3 percent of the paragraphs.
A cross tabulation between the various modes of argument and case types was also conducted. It reveals that almost half (49.4 percent) of the 1283 paragraphs which rely on precedent were from statutory cases, while 37.9 percent came in constitutional cases, and the remaining 12.7 percent were from “Other” types of cases such as those involving common law rules. Moreover, 80.8 percent of all arguments based on social science evidence occurred in constitutional cases, compared to 19.2 percent in statutory cases. Finally, 71.4 percent of all arguments based on higher law sources came in constitutional cases. It is clear from this that the Court relies on different types of arguments depending on the type of case it is deciding. Specifically, in 2004 the Justices were more likely to use briefs, social science evidence, and higher law sources to justify
their constitutional decisions, whereas textual sources, legislative materials, and precedent were the preferred justificatory devices in statutory cases.

Thus, the content analysis has substantiated the initial hypothesis that precedent specifically, and variables associated with the legal model generally, were used by the Court more than any other mode of argument to justify its decisions in 2004. However, it should be stated that these results are not necessarily generalizable to other years or applicable to other courts. The results simply demonstrate that precedent was the most frequently used mode of argument by the Supreme Court in 2004. Moreover, although the findings of the analysis parallel the results of previous research conducted in Canada and the U.S., they are subject to changes in the Court’s personnel and agenda. Different judges use different modes of argument to justify their decisions. Furthermore, changes in the subject matter of the Court’s agenda may result in the use of alternative modes of argument. For example, based on the present analysis it is reasonable to hypothesize that an increase in the number of statutory cases that the Court decides in a given term is likely to produce a concomitant increase in the use of textual sources by the Justices.

Perhaps more importantly, the results of this study do not prove that precedent influences the way in which the Justices decide cases. As the attitudinalists and realists have noted, factors such as precedent are used by judges to conceal their personal preferences which are the actual basis for their decisions. Despite these shortcomings, the forgoing analysis has been employed primarily to establish the salience of precedent, and the legal model, in the content of judicial opinions. The remaining sections of the current research will specifically examine the influence of precedent on judicial behaviour.
Having established the prominence of precedent in the Supreme Court's opinions, the second section of the research examines the influence of *stare decisis* in cases which alter precedent since 1950. It is divided into two parts: the first analyzes the characteristics of altering and altered decisions; the second explores the influence of precedent on the votes of the Justices in precedent altering cases.

An examination of the Supreme Court's published judgments since 1950, as well as academic literature, resulted in a list of 45 decisions which alter 61 precedents. The list of precedent altering-decisions along with the decisions that were altered appears in Appendix B. It also includes the "method of alteration," which is the specific language used by the Court in the "cases cited" section, such as "overruled" or "not followed," as well as the primary reason for altering the precedent.

The first precedent altering decision occurred in 1961; the most recent was in 2004. In 1985, the Court altered precedent in five cases, which is more than in any other year. The Court altered four precedents in 1987 and 1999, which was the second most in a single year. Between 1950 and 1984, the Court altered precedent in 12 cases. From 1985 to the present, the Court altered precedent on 33 occasions. The increased frequency of alterations since 1985 is consistent with the hypothesis that the Charter provided the Court with a mandate to alter its previous jurisprudence.

Chief Justice Dickson presided over the most alterations of precedent, 22 (36.1 percent), followed by Lamer with 17 (27.9 percent). Brian Dickson was appointed as Chief Justice in 1984, shortly after the first Charter case made its way onto the Court's docket. In 1990, Antonio Lamer was elevated to the position of Chief Justice. Together, Dickson and Lamer presided over more alterations of precedent than all of the other Chief Justices since 1950 combined. It is no coincidence that they were also the first two Chief Justices of the
Charter era during which Canadian law underwent significant doctrinal changes. Conversely, under the leadership of Bora Laskin, there were 13 (21.3 percent) precedent altering decisions. The current Chief Justice Beverley McLachlin has presided over 5 (8.2 percent) alterations of precedent, followed by Kerwin and Fauteux with 2 (3.3 percent) each.

In the majority of their precedent-altering decisions (75.4 percent), the Justices exhibited a high level of agreement. Determining the level of agreement was not a simple as counting the number of Justices in the majority and minority. For instance, in *R. v. Burke*, Justices McLachlin, L'Heureux-Dubé, Gonthier, and Bastarache dissented as to the outcome of the case, but agreed with the majority that the rule established in *R. v. Head* relating to the ability of a judge to reconvene a jury after it has been discharged should be altered. In contrast, moderate levels of agreement appeared in 8.2 percent of the Court's precedent-altering decisions, while 16.4 percent were altered with a low level of agreement. The data clearly indicate that when the Court decides to alter precedent, it has generally done so with a high level of agreement among the participating Justices.

The altered precedents vary in age from 2 years to 109, for an average of 30.21 years. When placed into an age-range categories, 31.1 percent of altered decisions are forty-one years or older, 4.9 percent are thirty-one to forty years old, 11.5 percent are twenty-one to thirty, 27.9 percent are eleven to twenty, and the remaining 24.6 percent are ten years old or less. Fifty-three of the altered precedents (86.9 percent) were decisions of the Supreme Court of Canada, while the remaining 8 (13.1 percent) were decisions of the Judicial Committee of the Privy Council or some other English court of appeal. Interestingly, the Court exhibited a high level of agreement in all of the decisions that altered an English precedent.

---

6 *R. v. Burke*, 120021 2 S.C.R. 557
Table 4.3
Cross tabulation of the Level of Agreement and Age of Altered Decision

<table>
<thead>
<tr>
<th>Age of Altered Decision</th>
<th>Low Level of Agreement</th>
<th>Moderate Level of Agreement</th>
<th>High Level of Agreement</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-to-10</td>
<td>3 (20.0%)</td>
<td>3 (20.0%)</td>
<td>9 (60.0%)</td>
<td>15 (100.0%)</td>
</tr>
<tr>
<td>11-to-20</td>
<td>7 (38.9%)</td>
<td>1 (5.6%)</td>
<td>10 (55.6%)</td>
<td>18 (100.0%)</td>
</tr>
<tr>
<td>21-to-30</td>
<td>0 (.0%)</td>
<td>0 (.0%)</td>
<td>6 (100.0%)</td>
<td>6 (100.0%)</td>
</tr>
<tr>
<td>31-to-40</td>
<td>0 (.0%)</td>
<td>1 (33.3%)</td>
<td>2 (66.7%)</td>
<td>3 (100.0%)</td>
</tr>
<tr>
<td>41 and older</td>
<td>0 (.0%)</td>
<td>0 (.0%)</td>
<td>19 (100.0%)</td>
<td>19 (100.0%)</td>
</tr>
<tr>
<td>Total</td>
<td>10 (16.4%)</td>
<td>5 (8.2%)</td>
<td>46 (75.4%)</td>
<td>61 (100%)</td>
</tr>
</tbody>
</table>

In addition, the data indicate the possibility of a relationship between the level of agreement among the Justices in cases that alter precedent and the age of the altered precedent. In particular, Table 4.3 presents a cross tabulation of the level of agreement and the ages of altered precedents, and shows, *inter alia*, that 100 percent of the altered precedents forty-one years or older were altered with a high level of agreement. In their study, Brenner and Spaeth hypothesized that “older precedents would tend to be overruled by a unanimous or nearly unanimous vote, while newer precedents would tend to be overruled by a minimum winning or close vote.” This was based on the belief that judges have less attachment or loyalty to older decisions, at least in part because they likely did not participate in the older decision. However, it could also mean that the precedent simply outlived its usefulness.

---

Although it may seem reasonable, based on the data in Table 4.3, to conclude that Brenner and Spaeth’s hypothesis holds true for the Supreme Court of Canada, there are reasons to question the validity of that position. Specifically, the majority of decisions in each of the age-range categories were altered with a high level of agreement among the Justices. Moreover, 100 percent of the altered precedents between the ages of twenty-one and thirty were altered with high levels of agreement. Low levels of agreement were found in only 10 of the total 61 altered precedents (16.4 percent). The highest proportion of decisions altered by low levels of agreement fell into the 11-to-20 age-range category. Thus, while not completely negating the possibility of a connection between age and level of agreement, the prevalence of high levels of agreement in all age-range categories substantially diminishes the significance of any association.

The reasons for altering precedent are presented in Table 4.4. It shows that the largest proportion of alterations, 31.1 percent, occurred because the Justices felt that the precedent was wrongly decided. For example, in Central Alberta Dairy Pool v. Alberta, the Court overturned a five-year old precedent pertaining to adverse effects discrimination and the duty of employers to accommodate their employees, conceding that, “the majority of this Court may have indeed erred” in the original precedent.8

The need to update the law in a particular area was offered as the primary reason given by the Court for altering precedent in 19.7 percent of the cases, especially those involving common law rules and doctrines. A prime example of this type of alteration is the case of Hamstra v. B.C. Rugby Union.9 Hamstra was rendered quadriplegic in a rugby match organized by the B.C. Rugby Union. He subsequently initiated an action claiming negligence

---

on the part of the Rugby Union. During the trial, several witnesses made reference to the possibility that the Rugby Union was insured.

Table 4.4
Basis for Altering Precedent

<table>
<thead>
<tr>
<th>Basis for Altering Precedent</th>
<th>Frequency</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Charter</td>
<td>12</td>
<td>19.7</td>
</tr>
<tr>
<td>Need to update law</td>
<td>12</td>
<td>19.7</td>
</tr>
<tr>
<td>Decision was wrong</td>
<td>19</td>
<td>31.1</td>
</tr>
<tr>
<td>Decision unworkable-</td>
<td>6</td>
<td>9.8</td>
</tr>
<tr>
<td>created uncertainty</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Decision attenuated by other</td>
<td>11</td>
<td>18.0</td>
</tr>
<tr>
<td>cases</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Expands criminal liability</td>
<td>1</td>
<td>1.6</td>
</tr>
<tr>
<td>Total</td>
<td>61</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Believing that the references could be prejudicial to their defence, the Rugby Union brought a motion seeking to have the jury discharged, which the trial judge granted. The trial judge’s decision to discharge the jury rested on the common law rule articulated by the Supreme Court in *Bowhey v. Theakston*, that a “jury should be discharged automatically if something occurs from which the jury might reasonably infer that the defendant is insured.”10 In *Hamstra*, the Supreme Court unanimously overruled *Theakston*, arguing that the rule was outdated since the prevalence of insurance in society today is widely known.11

Since the mid-1980s, the Court has altered 12 precedents (19.7 percent) because of the Charter of Rights and Freedoms. One of the first cases in which the Charter required the Court to alter a precedent was *R. v. Big M Drug Mart*.12 At issue in *Big M* was whether the federal Lord’s Day Act, which prohibited certain forms of work and business activity on

---

11 *Hamstra*, 1094.
Sundays, infringed the right to freedom of conscience and religion as guaranteed by section 2(a) of the Charter. In addition to finding the Lord’s Day Act unconstitutional, the Court refused to follow its decision in Robertson and Rosetanni, a case from 1963 in which the Act was upheld in a challenge based on the Bill of Rights. Justice Dickson, who authored the majority opinion in Big M, explicitly rejected the narrow meaning of “freedom of religion” espoused by the majority in Robertson and Rosetanni.\(^ {13}\)

According to the majority in Robertson and Rosentanni, the Bill of Rights was “not concerned with ‘human rights and fundamental freedoms’ in any abstract sense, but rather with such ‘rights and freedoms’ as they existed in Canada immediately before the statute was enacted.”\(^ {14}\) Professor Manfredi argues that the reasoning in Robertson and Rosetanni is grounded in a “discredited ‘frozen concepts’ theory of rights,” under which rights and freedoms are construed narrowly rendering them incapable of growth and development.\(^ {15}\) The Court’s decision in Big M is significant because it stands for the proposition that rights and freedoms under the Charter should be generously interpreted.\(^ {16}\) Furthermore, the case provides an excellent illustration of the Charter requiring the Court to update and alter its jurisprudence.

The Court altered 11 precedents (18 percent) on the basis that they had been attenuated by other cases. A precedent is attenuated when the foundation on which it was decided is substantially eroded or undermined by subsequent judgments of the Supreme Court. For example, in Vetrovec v. The Queen, the Justices refused to follow a decision of the House of Lords governing the corroboration of accomplice testimony, arguing that the

\(^ {13}\) Ibid., 349.
\(^ {16}\) Ibid.
decision had been “cast aside” by English courts and undermined by the two recent judgments of the Supreme Court of Canada.\textsuperscript{17}

The Court altered six precedents (9.8 percent) because the decisions proved to be unworkable or created uncertainty for lower court judges. Perhaps the best example of a decision being altered because it creates uncertainty is Minister of Indian Affairs v. Ranville, where the Court overruled its decision in Commonwealth of Puerto Rico v. Hernandez. For the majority, Justice Dickson stated that Hernandez should be overruled because, “in this instance adherence to the \textit{stare decisis} principle would generate more uncertainty than certainty.”\textsuperscript{18} After all, one of the traditional justifications for following a policy of \textit{stare decisis} is to promote legal certainty and predictability. Hence, a decision that creates uncertainty undermines the purpose of \textit{stare decisis} and should therefore be overruled.

In another case, Heredi v. Fenson, the Court unanimously overruled a series of precedents pertaining to the meaning of the phrase “damages occasioned by a motor vehicle” in the Saskatchewan Highway Traffic Act. The Justices maintained that the applicable precedents were unclear and failed to provide adequate guidance to lower court judges.\textsuperscript{19} For these reasons, the Court overruled the line of precedents.

The only case in which the Court altered a precedent because it had the effect of expanding criminal liability is R. v. Chaulk. At issue in Chaulk was the Criminal Code definition of the term “wrong” as it applies to the defence of insanity.\textsuperscript{20} For the majority, Lamer C.J. announced that the Court was prepared to overrule its decision in Schwartz v. The Queen, which had previously governed the meaning of the term “wrong” in the context of the insanity defence. In his opinion, Chief Justice Lamer referred to the factors outlined by

\textsuperscript{17} Vetrovec v. The Queen, [1982] 1 S.C.R. 811.
\textsuperscript{18} Min. of Indian Affairs v. Ranville, [1982] 2 S.C.R. 518.
\textsuperscript{19} Heredi v. Fenson, [2002] 2 S.C.R. 741, par. 31 – 32.
Dickson C.J., as he then was, in Bernard that would support a decision to overrule an earlier judgment. According to Lamer C.J., “the fourth factor that was discussed by Dickson C.J., and that is directly relevant to the case at bar, is whether the prior judgment... is unfavourable to an accused in that it expands the scope of criminal liability beyond acceptable limits.”\(^{21}\) In the view of the majority, Schwartz had the effect of expanding criminal liability to include persons who are incapable, because of a disease of the mind, of knowing that an act was wrong.\(^{22}\) On that basis, the definition of “wrong” from Schwartz was overruled.

Having examined the characteristics of Supreme Court decisions that alter precedent, the analysis now addresses the influence of stare decisis on the votes of the Justices in precedent-altering decisions. The sample for this section was drawn from the list of altering and altered precedents, and included only those Justices who participated in a precedent-altering decision as well as in the altered decision. Application of these criteria produced a sample of twenty-five Justices who participated in 62 pairs of altering and altered decisions since 1950.

\(^{21}\) Ibid., 1353.
\(^{22}\) Ibid.
Table 4.5
Support for Institutional and Personal Stare Decisis by Justice

<table>
<thead>
<tr>
<th>Justice</th>
<th># of Pairs of Altered/Altering Decisions</th>
<th>Pro-Legal Model</th>
<th>Pro-Personal Stare Decisis</th>
<th>Compatible with Neither</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taschereau</td>
<td>1</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Locke</td>
<td>1</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Abbott</td>
<td>1</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Martland</td>
<td>6</td>
<td>3 (50%)</td>
<td>5 (83.3%)</td>
<td>1 (16.7%)</td>
</tr>
<tr>
<td>Judson</td>
<td>4</td>
<td>2 (50%)</td>
<td>2 (50%)</td>
<td>2 (50%)</td>
</tr>
<tr>
<td>Ritchie</td>
<td>8</td>
<td>3 (37.5%)</td>
<td>4 (50%)</td>
<td>4 (50%)</td>
</tr>
<tr>
<td>Hall</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Spence</td>
<td>3</td>
<td>1 (33.3%)</td>
<td>1 (33.3%)</td>
<td>2 (66.7%)</td>
</tr>
<tr>
<td>Laskin</td>
<td>2</td>
<td>2 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dickson</td>
<td>6</td>
<td>2 (33.3%)</td>
<td>4 (66.7%)</td>
<td></td>
</tr>
<tr>
<td>Beetz</td>
<td>3</td>
<td></td>
<td>3 (100%)</td>
<td></td>
</tr>
<tr>
<td>deGrandpre</td>
<td>1</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
<td></td>
</tr>
<tr>
<td>Estey</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
</tr>
<tr>
<td>McIntyre</td>
<td>1</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
<td></td>
</tr>
<tr>
<td>Chouinard</td>
<td>1</td>
<td>1 (100%)</td>
<td>1 (100%)</td>
<td></td>
</tr>
<tr>
<td>Lamer</td>
<td>5</td>
<td>2 (40%)</td>
<td>3 (60%)</td>
<td></td>
</tr>
<tr>
<td>Wilson</td>
<td>1</td>
<td></td>
<td>1 (100%)</td>
<td></td>
</tr>
<tr>
<td>L'Heureux-Dubé</td>
<td>2</td>
<td></td>
<td>2 (100%)</td>
<td></td>
</tr>
<tr>
<td>Gonthier</td>
<td>3</td>
<td></td>
<td></td>
<td>3 (100%)</td>
</tr>
<tr>
<td>Cory</td>
<td>2</td>
<td>2 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>McLachlin</td>
<td>4</td>
<td>1 (25%)</td>
<td>3 (75%)</td>
<td></td>
</tr>
<tr>
<td>Iacobucci</td>
<td>2</td>
<td>1 (50%)</td>
<td>1 (50%)</td>
<td></td>
</tr>
<tr>
<td>Major</td>
<td>1</td>
<td>1 (100%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bastarache</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
</tr>
<tr>
<td>Binnie</td>
<td>1</td>
<td></td>
<td></td>
<td>1 (100%)</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>62</strong></td>
<td><strong>12 (19.4%)</strong></td>
<td><strong>28 (45.2%)</strong></td>
<td><strong>34 (54.8%)</strong></td>
</tr>
</tbody>
</table>

The data displayed in Table 4.5 show the number of pairs of altering and altered decisions that each Justice has participated in, and the number votes compatible with the legal model (institutional *stare decisis*), personal *stare decisis*, and neither. On an individual basis, only six of the twenty-five Justices voted compatibly with the legal model version of Reprinted with permission of the copyright owner. Further reproduction prohibited without permission.
stare decisis at a rate above 33 percent. Moreover, fourteen Justices voted compatibly with personal stare decisis at a rate 34 percent or above. Thus, the data confirms the first major hypothesis, which is that a majority of Justices exhibit a low level of support for the legal model (33 percent or less), and moderate to high levels of support for personal stare decisis (34 percent and above).

Considered collectively, the Justices voted compatibly with the legal model version of stare decisis in 19.4 percent of the cases. In contrast, the Justices voted compatibly with personal stare decisis in 45.2 percent of the cases, which is a moderate level of support. This verifies the second major hypothesis that the Justices exhibit a low level of support (less than 33 percent) for the legal model version of stare decisis, and a moderate to high level of support for institutional stare decisis.

Three Justices, Abbott, de Grandpré, and McIntyre supported the legal model version of precedent at a rate of 100 percent. However, each participated in only one pair of cases. If they are excluded, Justices Martland and Judson are the most supportive of the legal model, followed by Ritchie. Justice Martland participated in six pairs of cases, and voted compatibly with legal stare decisis in three pairs (50 percent). This means that Martland was opposed to the alteration of precedent in 50 percent of the cases. Judson participated in six pairs of cases and voted according to institutional stare decisis in three (50 percent). In his approximately twenty-five year career as a Supreme Court Justice, Roland Ritchie took part in eight pairs of cases, which is more than any other Justice, and conformed to the legal model in three (37.5 percent).

For example, in Brant Dairy Co. Ltd. v. Milk Commission of Ontario et al.\textsuperscript{23}, Martland joined Abbott, Judson, and Ritchie in opposing the alteration of the Court's

precedent in Robbins et al. v. Ontario Flue-Cured Tobacco Growers’ Marketing Board\textsuperscript{24}, an administrative law case dealing with the power of the Milk Commission to delegate authority to make regulations. Martland and Judson had been part of the majority in Robbins, thereby making their votes in Bram Dairy consistent with both institutional and personal \textit{stare decisis}. In \textit{Bell v. The Queen}\textsuperscript{25}, a case concerning the reasonableness of a municipal zoning by-law, Martland voted against altering the Court’s decision from six years earlier in \textit{City of Toronto v. Polai}.\textsuperscript{26} Martland’s vote in \textit{Bell} is also consistent with institutional and personal \textit{stare decisis}.

In \textit{Keizer v. Hanna}\textsuperscript{27}, Justices Judson and de Grandpré dissented from the alteration of the Court’s decision in \textit{Gehrmann v. Lavoie}. Both cases involved the awarding of damages following fatal car accidents. The majority in \textit{Keizer} held that the rule articulated in \textit{Gehrmann} governing the calculation of damages should be altered to account for the “impact of income tax.”\textsuperscript{28} Based on the coding conventions, Judson and de Grandpré’s dissenting votes in \textit{Keizer} are considered consistent with institutional and personal \textit{stare decisis}.

As seen in Table 4.6, the Justices' votes conform to personal \textit{stare decisis} in 45.2 percent of the pairs of cases, which is more than twice the number of votes that conform to institutional precedent. The salience of judicial conformity to personal \textit{stare decisis} in cases that alter precedent lends support to the position that when rendering decisions, judges strive to achieve consistency with their past judgments. From this perspective, judges act strategically to maintain or enhance their reputation as consistent jurists. However, it is also possible that when judges conform to personal \textit{stare decisis}, it is because their decisions are


\textsuperscript{25} Sell v. The Queen, [1979] 2 S.C.R. 212.


\textsuperscript{28} Ibid., 347.
the result of a specific attitude toward the issue(s) raised in a particular case, rather than a conscious attempt to be consistent.

Table 4.6
Frequency of the Justices’ Votes in Altered and Altering Decisions

<table>
<thead>
<tr>
<th>Justice</th>
<th>Majority-minority</th>
<th>Minority-majority</th>
<th>Majority-majority</th>
<th>Minority-minority</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taschereau</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Locke</td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Abbott</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Martland</td>
<td>3 (50%)</td>
<td>2 (33.3%)</td>
<td>1 (16.7%)</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Judson</td>
<td>2 (50%)</td>
<td></td>
<td>2 (50%)</td>
<td></td>
<td>4</td>
</tr>
<tr>
<td>Ritchie</td>
<td>3 (37.5%)</td>
<td>1 (12.5%)</td>
<td>4 (50%)</td>
<td></td>
<td>8</td>
</tr>
<tr>
<td>Hall</td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Spence</td>
<td>1 (33.3%)</td>
<td></td>
<td>2 (66.7%)</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Laskin</td>
<td></td>
<td>2 (100%)</td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Dickson</td>
<td></td>
<td>2 (33.3%)</td>
<td>4 (66.7%)</td>
<td></td>
<td>6</td>
</tr>
<tr>
<td>Beetz</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>de Grandpré</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Estey</td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>McIntyre</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Chouinard</td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>L'Amour</td>
<td>2 (40%)</td>
<td>3 (60%)</td>
<td></td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>Wilson</td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>L'Heureux-Dubc</td>
<td></td>
<td>2 (100%)</td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Gonthier</td>
<td></td>
<td>3 (100%)</td>
<td></td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>Cory</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>McLachlan</td>
<td>2 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
<tr>
<td>Iacobucci</td>
<td>1 (50%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Major</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Bastarache</td>
<td></td>
<td></td>
<td>1 (100%)</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Binnie</td>
<td>1 (100%)</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>14 (22.6%)</strong></td>
<td><strong>14 (22.6%)</strong></td>
<td><strong>34 (54.8%)</strong></td>
<td><strong>0</strong></td>
<td><strong>62</strong></td>
</tr>
</tbody>
</table>

Attention should also be given to the number of votes which do not conform to either form of *stare decisis*. Specifically, over half of the Justices’ votes (54.8 percent) were classified as consistent with neither institutional or personal *stare decisis*. This is further illustrated by examining Table 4.6, which displays the patterns of the Justices’ membership in majority and minority opinion coalitions in the altered and altering decisions. Interestingly,
majority-majority voting (54.8 percent) predominates by 32.2 percent over majority-minority and minority-majority voting (22.6 percent each). There is no example of a Justice being in the minority in both the altered and altering decisions. The prevalence of majority-majority voting is difficult to explain since it means that a Justice voted with the majority in the precedent and in the altering decision.

One possible explanation for the prevalence of majority-majority voting patterns is the power of institutional norms such as collegiality and unanimity. Justice Wilson maintains that on a collegial tribunal such as the Supreme Court, the justices are obligated to “strive for a consensus, or at least to submerge individuality in the interests of fewer sets of reasons….”29 Thus, as proponents of the strategic model expect, institutional norms which stress collegiality and unanimity may lead some justices to join opinions that they do not entirely agree with.

Alternatively, other strategic scholars hypothesize that majority-majority voting patterns may be part of a long-term political strategy, whereby a justice supports the position favoured by another justice, in exchange for the support of that justice in a subsequent case. The final, and perhaps simplest explanation for majority-majority voting is that justices want to be on the “winning” (majority) side, especially in important cases.

The results of the foregoing analysis indicate that the form of precedent associated with the legal model of judicial behaviour has had a very limited influence on the votes of Canadian Supreme Court Justices in cases that alter precedent. However, these findings are limited to cases in which the Court alters precedent and cannot be generalized to include the entire population of Supreme Court judgments. Moreover, the results are inherently biased because the analysis focused specifically on precedent-altering decisions. Since the majority

---

of Justices voted in favour of altering precedent, support for the legal model is expected to be low. For these reasons, additional research on the influence of precedent in regular cases is required.

In order to assess the influence of precedent on the decisions of the Supreme Court of Canada it was necessary to first compile a list of precedent-setting cases and their progeny. This proved to be an extremely tedious task, as it required examining every volume of the Supreme Court Reports from 1950 to the present, recording almost every dissenting vote, and grouping precedent and progeny cases based on citation patterns and similarities among cases. Construction of the list was aided by scholarly literature, however, considering the paucity of data related to this subject, it offered minimal assistance.

The result is a list of 295 cases, comprised of 114 precedent-setting cases and 181 progeny cases. Moreover, the progeny cases produced a total of 291 votes which were classified according to whether they are preferential (consistent with the judge’s revealed preference) or precedential (conform to existing precedent). Progeny votes were further classified into one of three categories representing strong, moderate, and weak levels of expression. The list of precedent and progeny cases showing each Justice’s vote appears in Table 4.7. It does not purport to be exhaustive; given the amount of information involved, it is reasonable to expect that a few cases have been inadvertently missed. The progeny cases have been indented, and are located directly below the precedents to which they correspond. The Justices’ names are used to represent their votes in the progeny cases. They appear next to the name of progeny case, in either the preference or precedent column.

To save space, the Justices’ names have been abbreviated as follows: Loc-Locke; Est-J.W. Estey; Cart-Cartwright; Ker-Kerwin; Ran-Rand; Fau-Fauteux; Tas-Taschereau; Abt-Abbott; Sp-Spence; Hall-Hall; Jud-Judson; Rit-Ritchie; Pig-Pigeon; Las-Laskin; Dck-Dickson; Gra-de Grandpré; Btz-Beetz; Lam-Lamer; Mcy-McIntyre; Dain-Le Dain; Wil-

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
In addition, a bracketed number appears next to each vote indicating the level of expression ((1) = strong pref/prec; (2) = moderate; (3) = weak). Finally, a single asterisk (*) appears before the name of Justices who did not participate in the original precedent case, but dissented in one of its progeny and relied on that dissent in subsequent cases. Two asterisks (**) appear before the names of judges who, instead of dissenting in progeny cases, file concurring opinions but which express disagreement on some point that led the judge to dissent in the precedent decision.
Table 4.7  
Votes in Precedent and Progeny Cases

<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Min. of Nat. Revenue v. T.E. McCool Ltd. [1950]</td>
<td>Loc(3)</td>
<td></td>
</tr>
<tr>
<td>Joggins Coal Co. Ltd. v. Min. of Nat. Revenue [1950]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.P.R. Co. v. A.G. Sask. [1951]</td>
<td>Est(1)</td>
<td></td>
</tr>
<tr>
<td>C.P.R. Co. v. City of Winnipeg [1952]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The King v. The Assessors of the Town of Sunny Brae [1952]</td>
<td>Ker(2)-Cart(2)</td>
<td></td>
</tr>
<tr>
<td>Wilder v. Min. of Nat. Revenue [1952]</td>
<td>Ran(2)</td>
<td></td>
</tr>
<tr>
<td>Min. of Nat. Revenue v. Wain Town Gas &amp; Oil Co. Ltd. [1952]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Azoulay v. The Queen [1952]</td>
<td>Ran(2)</td>
<td></td>
</tr>
<tr>
<td>Cathro v. The Queen [1956]</td>
<td>Fau(2)</td>
<td></td>
</tr>
<tr>
<td>Marsh v. Kulchar [1952]</td>
<td>Cart(2)</td>
<td></td>
</tr>
<tr>
<td>King v. Colonial Homes Ltd. et al. [1956]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Marsden Kooler Trans. Ltd et al. v. Pollock [1953]</td>
<td>Loc(1)</td>
<td></td>
</tr>
<tr>
<td>Archibald et al. v. Nesting et al. [1953]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Brusch v. The Queen [1953]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Parkes v. The Queen [1956]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Toronto Newspaper Guild v. Globe Printing Co. [1953]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Labour Relations Board v. Traders’ Service Ltd. [1958]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kelsey v. The Queen [1953]</td>
<td>Cart(3)</td>
<td></td>
</tr>
<tr>
<td>Binet v. The Queen [1954]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Regent Vending Machines Ltd. v. Alb. Vending Machines [1954]</td>
<td>Ker(2)-Est(2)</td>
<td></td>
</tr>
<tr>
<td>Johnson v. A.G. Alberta [1954]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>DeWare v. The Queen [1954]</td>
<td>Ker(2)-Est(2)</td>
<td></td>
</tr>
<tr>
<td>Min. of Nat. Revenue v. Anaconda American Brass Ltd. [1954]</td>
<td>Est(3)</td>
<td></td>
</tr>
<tr>
<td>Wilson v. Min. of Nat. Revenue [1955]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Min. of Nat. Revenue v. Trans Can. Investment Co. Ltd. [1956]</td>
<td>Est(3)</td>
<td></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 4.7  
Continued

<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>C.P.R. &amp; Imperial Oil Ltd. v. Turta at al. [1954]</td>
<td>Loc(2)-Cart(2)</td>
<td></td>
</tr>
<tr>
<td>Prudential Trust Co. Ltd. v. Registrar, Humboldt [1957]</td>
<td>Loc(2)</td>
<td></td>
</tr>
<tr>
<td>Eli Lilly &amp; Co. Ltd. v. Min. of Nat. Revenue [1955]</td>
<td>Tas(2)-Abt(2)</td>
<td></td>
</tr>
<tr>
<td>Canadian General Electric Co. v. Min. of Nat. Revenue [1962]</td>
<td>Loc(3)</td>
<td></td>
</tr>
<tr>
<td>Boucher v. The Queen [1955]</td>
<td>Cart(2)</td>
<td></td>
</tr>
<tr>
<td>Provencher v. The Queen [1956]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stevenson v. Reliance Petroleum Ltd. [1956]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prudential Trust Co. Ltd. v. Cugnet [1956]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Prudential Trust Co. Ltd. v. Olsen [1960]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bradley v. The Queen [1956]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Queen v. Cote [1964]</td>
<td>Cart(3)</td>
<td></td>
</tr>
<tr>
<td>Silvestro v. The Queen [1965]</td>
<td>Cart(3)</td>
<td></td>
</tr>
<tr>
<td>The Queen v. Lemire [1965]</td>
<td>Cart(3)-*Sp(3)</td>
<td></td>
</tr>
<tr>
<td>Wild v. The Queen [1971]</td>
<td>Cart(2)-*Hall(2)-*Sp(2)</td>
<td></td>
</tr>
<tr>
<td>The Queen v. Bagshaw [1972]</td>
<td>*Sp(1)</td>
<td></td>
</tr>
<tr>
<td>The Queen v. Paul [1977]</td>
<td>*Sp(2)</td>
<td></td>
</tr>
<tr>
<td>City of Westmount v. Montreal Trans. Comm. [1958]</td>
<td>Ran(1)-Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Goldhar v. The Queen [1960]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>In Re Darby [1964]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Frobisher v. Canadian Pipelines &amp; Petroleums Ltd. [1960]</td>
<td>Loc(1)</td>
<td></td>
</tr>
<tr>
<td>City of Halifax v. Vaughan Construction Co. Ltd. [1961]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>O'Grady v. Sparling [1960]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Mann v. The Queen [1966]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Mclver v. The Queen [1966]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Irrigation Industries Ltd. v. Min. of Nat. Revenue [1962]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Montreal Trust Co. v. Min. of Nat. Revenue [1962]</td>
<td>Jud(3)</td>
<td></td>
</tr>
<tr>
<td>Robertson &amp; Rosetanni v. The Queen [1963]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>The Queen v. Drybones [1970]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Koury v. The Queen [1964]</td>
<td>Rit(2)</td>
<td></td>
</tr>
<tr>
<td>Guimond v. The Queen [1979]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Roumieu v. Osborne [1965]</td>
<td>Jud(1)</td>
<td></td>
</tr>
<tr>
<td>Corrie v. Gilbert [1965]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Re Martin; MacGregar v. Ryan [1965]</td>
<td>Jud(2)</td>
<td></td>
</tr>
<tr>
<td>National Trust Co. Ltd. v. Fleury et al. [1965]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Queen v. Devereux [1965]</td>
<td>Cart(3)</td>
<td></td>
</tr>
<tr>
<td>The Queen v. George [1966]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Daniels v. White &amp; The Queen [1968]</td>
<td>Cart(1)</td>
<td></td>
</tr>
<tr>
<td>Gordon v. The Queen [1965]</td>
<td>Cart(3)</td>
<td></td>
</tr>
<tr>
<td>Poole v. The Queen [1967]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Klippert v. The Queen [1967]</td>
<td>Cart(3)</td>
<td></td>
</tr>
<tr>
<td>Bingham v. The Queen [1971]</td>
<td>*Jud(2)</td>
<td></td>
</tr>
<tr>
<td>Sterling Trust Co. v. Postma et al. [1965]</td>
<td>Jud(3)-Rit(3)</td>
<td></td>
</tr>
<tr>
<td>Vana v. Tosta et al. [1968]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>King Edward Properties Ltd. v. Winnipeg [1967]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mapa et al. v. Township of North York et al. [1967]</td>
<td>Mart(1)</td>
<td></td>
</tr>
<tr>
<td>Ample Investments Ltd. v. Township of North York [1967]</td>
<td>Mart(1)</td>
<td></td>
</tr>
<tr>
<td>Tashan Ltd. v. Township of North York et al. [1967]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hadden v. The Queen [1968]</td>
<td>Fau(2)-Abt(2)-Mart(2)-Rit(2)</td>
<td></td>
</tr>
<tr>
<td>Poole v. The Queen [1968]</td>
<td>Fau(1)-Abt(1)-Mart(1)-Rit(1)</td>
<td></td>
</tr>
<tr>
<td>Mendick v. The Queen [1969]</td>
<td>Mart(1)-Rit(1)</td>
<td></td>
</tr>
<tr>
<td>Hatchwell v. The Queen [1976]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Paton v. The Queen [1968]</td>
<td>Cart(2)-Hall(2)-Sp(2)-Pig(2)</td>
<td></td>
</tr>
<tr>
<td>Sanders v. The Queen [1970]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>De Clercq v. The Queen [1968]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Gauthier [1977]</td>
<td>Sp(3)</td>
<td></td>
</tr>
<tr>
<td>Sunbeam Co. Ltd. v. The Queen [1969]</td>
<td>Jud(1)-Sp(2)</td>
<td></td>
</tr>
<tr>
<td>Lampard v. The Queen [1969]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 4.7
Continued

<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Vinnal v. The Queen [1970]</td>
<td>Mart(3)-Rit(3)</td>
<td>Rit(2)</td>
</tr>
<tr>
<td>Alexandroff v. The Queen [1970]</td>
<td>Mart(3)-Rit(3)</td>
<td>Rit(2)</td>
</tr>
<tr>
<td>Levesque v. Comeau et al. [1970]</td>
<td>Rit(2)</td>
<td>*Sp(2)</td>
</tr>
<tr>
<td>The Queen v. Lupien [1970]</td>
<td>Rit(2)</td>
<td>Rit(2)</td>
</tr>
<tr>
<td>Perrasult v. The Queen [1971]</td>
<td>Hall(2)-Sp(2)</td>
<td>Pige(3)</td>
</tr>
<tr>
<td>The Queen v. Wray [1971]</td>
<td>Hall(2)-Sp(2)</td>
<td>Pige(3)</td>
</tr>
<tr>
<td>John v. The Queen [1971]</td>
<td>Hall(2)-Sp(2)</td>
<td>Pige(3)</td>
</tr>
<tr>
<td>The Queen v. Nord-Deutsche et al. [1971]</td>
<td>Hall(2)-Sp(2)</td>
<td>Pige(3)</td>
</tr>
<tr>
<td>The Ship Arthur Stove v. Stoneffax et al. [1971]</td>
<td>Hall(2)-Sp(2)</td>
<td>Pige(3)</td>
</tr>
<tr>
<td>Piche v. The Queen [1971]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Powell v. The Queen [1977]</td>
<td>Rit(1)-Mart(2)-Pig(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Erven v. The Queen [1979]</td>
<td>Rit(1)-Mart(2)-Pig(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Judson v. Governors of the University of Toronto [1972]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Kalinin v. Metro Toronto [1972]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Metro Toronto v. Loblaw Co. Ltd [1972]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Brownridge v. The Queen [1972]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Taraschuk v. The Queen [1977]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Chromiak v. The Queen [1980]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Arthurs v. The Queen [1974]</td>
<td>Jud(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Harrison v. The Queen [1975]</td>
<td>Las(3)-Sp(3)</td>
<td>Jud(3)-Sp(3)</td>
</tr>
<tr>
<td>Adgey v. The Queen [1975]</td>
<td>Las(3)-Sp(3)</td>
<td>Jud(3)-Sp(3)</td>
</tr>
<tr>
<td>Caccamo v. The Queen [1976]</td>
<td>Las(3)-Sp(3)</td>
<td>Jud(3)-Sp(3)</td>
</tr>
<tr>
<td>Ross v. Registrar of Motor Vehicles for Quebec [1975]</td>
<td>Rit(1)-Mart(1)</td>
<td>Rit(1)-Mart(1)</td>
</tr>
<tr>
<td>Bell v. A.G. P.E.I. [1975]</td>
<td>Rit(1)-Mart(1)</td>
<td>Rit(1)-Mart(1)</td>
</tr>
<tr>
<td>Kienapple v. The Queen [1975]</td>
<td>Rit(1)-Mart(1)</td>
<td>Rit(1)-Mart(1)</td>
</tr>
<tr>
<td>Dore v. A.G. Canada [1975]</td>
<td>Rit(1)-Mart(1)</td>
<td>Rit(1)-Mart(1)</td>
</tr>
<tr>
<td>Sheppe v. The Queen [1980]</td>
<td>Rit(1)-Mart(1)</td>
<td>Rit(1)-Mart(1)</td>
</tr>
<tr>
<td>The Queen v. Burnshire [1975]</td>
<td>Las(2)-Sp(2)</td>
<td>Las(2)-Sp(2)</td>
</tr>
<tr>
<td>A.G. Canada v. Canard [1976]</td>
<td>Las(2)-Sp(2)</td>
<td>Las(2)-Sp(2)</td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hogan v. The Queen [1975]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rilling v. The Queen [1976]</td>
<td>Las(2)-Sp(2)</td>
<td></td>
</tr>
<tr>
<td>Jumaga v. The Queen [1977]</td>
<td>Las(2)-Sp(2)-*Dck(2)</td>
<td></td>
</tr>
<tr>
<td>The Queen v. Hamm [1977]</td>
<td>Las(2)-Sp(2)-*Dck(2)</td>
<td></td>
</tr>
<tr>
<td>Puerto Rico v. Hernandez [1975]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Vardy v. Scott [1977]</td>
<td>Las(2)-Sp(2)</td>
<td>Jud(2)</td>
</tr>
<tr>
<td>Ross Southward Tire v. Pyrotech Products [1976]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>T. Eaton Company v. Smith et al. [1978]</td>
<td>Gra(2)</td>
<td>Btz(2)</td>
</tr>
<tr>
<td>Greenwood Shopping Plaza v. Beattie [1980]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ref. Re Anti-Inflation Act [1976]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Faber v. The Queen [1976]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>The Queen v. Hauser [1979]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Schwartz v. The Queen [1977]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Cooper v. The Queen [1980]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kjeldsen v. The Queen [1981]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Abbey [1982]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hill v. The Queen [1977]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Gardiner [1982]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mulligan v. The Queen [1977]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Leary v. The Queen [1978]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Young v. The Queen [1981]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Quin [1988]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Bernard [1988]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Capital Cities Communications Inc. v. C.R.T.C. [1978]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Public Service Board v. Dionne [1978]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rosen v. The Queen [1980]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Goldman v. The Queen [1980]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 4.7
Continued

<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pappajohn v. The Queen [1980]</td>
<td></td>
<td>Dck(2)-Est2(2)</td>
</tr>
<tr>
<td>Sansregret v. The Queen [1985]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Four B. Man. Ltd. v. United Garment Workers et al. [1980]</td>
<td></td>
<td>Rit(2)</td>
</tr>
<tr>
<td>The Queen v. Sutherland [1980]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rothman v. The Queen [1981]</td>
<td></td>
<td>Las(2)-Est2(2)</td>
</tr>
<tr>
<td>Arnato v. The Queen [1982]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ford v. The Queen [1982]</td>
<td></td>
<td>Dck(2)</td>
</tr>
<tr>
<td>The Queen v. Toews [1985]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Therens [1985]</td>
<td></td>
<td>Mcy(2)-Dain(2)</td>
</tr>
<tr>
<td>Trask v. The Queen [1985]</td>
<td></td>
<td>Mcy(2)-Dain(2)</td>
</tr>
<tr>
<td>Rahn v. The Queen [1985]</td>
<td></td>
<td>Mcy(2)-Dain(2)</td>
</tr>
<tr>
<td>R v. Thomsen [1988]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dubois v. The Queen [1985]</td>
<td></td>
<td>Mcy(1)</td>
</tr>
<tr>
<td>R v. Mannion [1986]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Macdonald v. City of Montreal [1986]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Mills v. The Queen [1986]</td>
<td></td>
<td>Dck(3)-Lam(3)</td>
</tr>
<tr>
<td>Carter v. The Queen [1986]</td>
<td>**Wil(3)</td>
<td></td>
</tr>
<tr>
<td>R v. Kalan [1989]</td>
<td>Lam(2)-Wil(2)</td>
<td></td>
</tr>
<tr>
<td>Mezzo v. The Queen [1986]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Monteleone [1987]</td>
<td>Lam(2)-For(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Jacobs [1988]</td>
<td>Lam(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Hare [1989]</td>
<td>Lam(1)-For(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Hall [1989]</td>
<td>Lam(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Collins [1987]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Sieben [1987]</td>
<td>**Mcy(3)</td>
<td></td>
</tr>
<tr>
<td>R v. Hamill [1987]</td>
<td>**Mcy(3)</td>
<td></td>
</tr>
</tbody>
</table>

Table 4.7

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ref. Re Public Service Employee Relations Act (Alb.) [1987]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>P.S.A.C. v. Canada [1987]</td>
<td>Dck(1)-Wil(1)</td>
<td></td>
</tr>
<tr>
<td>United States v. Allard [1987]</td>
<td>Lam(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Wigglesworth [1987]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Burnham v. Metro Toronto Police [1987]</td>
<td>Est2(2)</td>
<td></td>
</tr>
<tr>
<td>Trumbley &amp; Pugh v. Metro Toronto Police [1987]</td>
<td>Est2(2)</td>
<td></td>
</tr>
<tr>
<td>Trimm v. Durham Regional Police [1987]</td>
<td>Est2(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Vaillancourt [1987]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Crown Zellerbach Canada Ltd. [1988]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Hydro-Quebec [1997]</td>
<td>Lam(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Vermette [1988]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Kearney [1992]</td>
<td>Lam(1)</td>
<td></td>
</tr>
<tr>
<td>Lac Minerals Ltd. v. Int. Nat. Corona Resources Ltd. [1989]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hodgkinson v. Simms [1994]</td>
<td>Sop(1)</td>
<td></td>
</tr>
<tr>
<td>Soulos Korkontzilas [1997]</td>
<td>Sop(1)</td>
<td></td>
</tr>
<tr>
<td>Nelles v. Ontario [1989]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proulx v. A.G. Quebec [2001]</td>
<td>Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>United States v. Cotroni [1989]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>McVey v. United States [1992]</td>
<td>Sop(1)</td>
<td></td>
</tr>
<tr>
<td>United States v. Doyer [1993]</td>
<td>Sop(3)</td>
<td></td>
</tr>
<tr>
<td>R v. M. (S.H.) [1989]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. L. (J.E.) [1989]</td>
<td>For(1)-Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>Just v. British Columbia [1989]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hollis v. Dow Corning Corp. [1995]</td>
<td>Sop(1)</td>
<td></td>
</tr>
<tr>
<td>Thomson Newspapers Ltd. v. Canada [1990]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Stelco Inc. v. A.G. Canada [1990]</td>
<td>Wil(1)-Sop(1)</td>
<td></td>
</tr>
<tr>
<td>Ref. Re Ss. 193 &amp; 195.1 (1)(c) of the Criminal Code [1990]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Stagnitta [1990]</td>
<td>Wil(2)-Dubé(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Skinner [1990]</td>
<td>Wil(2)-Dubé(2)</td>
<td></td>
</tr>
<tr>
<td>R v. McDonnell [1997]</td>
<td>Dubé(2)</td>
<td></td>
</tr>
</tbody>
</table>

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 4.7
Continued

<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>R v. Martineau [1990]</td>
<td>Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Rodney [1990]</td>
<td>Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>R v. J. (J.T.) [1990]</td>
<td>Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Lachance [1990]</td>
<td>Dubé(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Durette [1994]</td>
<td>Dubé(2)-McL(2)</td>
<td></td>
</tr>
<tr>
<td>McKinney v. University of Guelph [1990]</td>
<td>Wil(1)-Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>Harrison v. University of British Columbia [1990]</td>
<td>Wil(1)-Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>Stoffman v. Vancouver General Hospital [1990]</td>
<td>For(1)-Sop(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Andrews [1990]</td>
<td>For(1)-Sop(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>Canada (Human Rights Comm.) v. Taylor [1990]</td>
<td>For(1)-Sop(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Chaulk [1990]</td>
<td>Sop(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Ratti [1991]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Kindler v. Canada (Minister of Justice) [1991]</td>
<td>Lam(1)-Sop(1)-Cor(1)</td>
<td></td>
</tr>
<tr>
<td>Ref. Re Ng Extradition [1991]</td>
<td>Lam(1)-Sop(1)-Cor(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Haroun [1997]</td>
<td>Sop(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Osoin [1993]</td>
<td>Dubé(1)-*McL(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Esau [1997]</td>
<td>Dubé(1)-*McL(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Morin [1992]</td>
<td>Lam(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Sharma [1992]</td>
<td>Lam(1)</td>
<td></td>
</tr>
<tr>
<td>Precedent/Progeny</td>
<td>Preference</td>
<td>Precedent</td>
</tr>
<tr>
<td>------------------------------------------</td>
<td>------------</td>
<td>-----------</td>
</tr>
<tr>
<td>Symes v. Canada [1993]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Egan v. Canada [1995]</td>
<td>Dubé(2)-McL(2)</td>
<td></td>
</tr>
<tr>
<td>Thibaudeau v. Canada [1995]</td>
<td>Dubé(2)-McL(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Bartle [1994]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Prosper [1994]</td>
<td>Dubé(2)-Gon(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Pozniak [1994]</td>
<td>Dubé(2)-Gon(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Feeney [1997]</td>
<td>Dubé(2)-Gon(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Heywood [1994]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Dunn [1995]</td>
<td>Dubé(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Bunn [2000]</td>
<td>Dubé(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Power [1994]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Jacques [1996]</td>
<td>Sop(1)-Maj(2)</td>
<td></td>
</tr>
<tr>
<td>R v. P. (M.B.) [1994]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. G. (S.G.) [1997]</td>
<td>Dubé(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>C.B.C. v. Canada (Labour Relations Board) [1995]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Royal Oak Mines Ltd. v. Canada [1996]</td>
<td>McL(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Silveira [1995]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. O’Connor [1995]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Wickstaed [1997]</td>
<td>Sop(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Robinson [1996]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. McMaster [1996]</td>
<td>Dubé(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Lemky [1996]</td>
<td>Dubé(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Van der Peet [1996]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. N.T.C. Smokehouse Ltd. [1996]</td>
<td>Dubé(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>Adler v. Ontario [1996]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Lavoie v. Canada [2002]</td>
<td>McL(2)-Dubé(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Golden [2001]</td>
<td>Dube(1)-Gon(2)-McL(2)</td>
<td></td>
</tr>
</tbody>
</table>
Table 4.7
Continued

<table>
<thead>
<tr>
<th>Precedent/Progeny</th>
<th>Preference</th>
<th>Precedent</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dobson v. Dobson [1999]</td>
<td>Maj(1)</td>
<td></td>
</tr>
<tr>
<td>Continental Bank Leasing Corp. v. Canada [1998]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Thomas [1998]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Warsing [1998]</td>
<td>Dubé(1)-Gon(1)-McL(1)</td>
<td></td>
</tr>
<tr>
<td>Abouchar v. Ottawa French Language School Board [1999]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Garland v. Consumers' Gas Co. [1998]</td>
<td>Bas(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Brooks [2000]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Parrott [2001]</td>
<td>Dube(2)-Gon(2)</td>
<td></td>
</tr>
<tr>
<td>Town of Ajax v. C.A.W., Local 222 [2000]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>City of Sept-Iles v. Quebec (Labour Court) [2001]</td>
<td>Bas(1)</td>
<td></td>
</tr>
<tr>
<td>R v. Oickle [2000]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>R v. Tessier [2002]</td>
<td>Arb(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Advance Cutting &amp; Coring Ltd. [2001]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>C.U.P.E. v. Ontario (Minister of Labour) [2003]</td>
<td>McL(1)-Maj(1)-Bas(1)</td>
<td></td>
</tr>
<tr>
<td>Housen v. Nikolaisen [2002]</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hartshorne v. Hartshome [2004]</td>
<td>Bin(2)-LeB(2)</td>
<td></td>
</tr>
<tr>
<td>R v. Malmö-Levine [2003]</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Tables 4.8 - 4.12 summarize the total number of preferential and precedential votes for each Justice. There are seven Justices per table and five tables for a total of thirty-five Justices. The Justices were grouped together chronologically according to the order in which they appear in Table 4.7. The ensuing discussion will identify the significant findings and highlight some of the more noteworthy examples of preferential and precedential voting.

| Table 4.8 |
| Preferential and Precedential Votes by Justice |

<table>
<thead>
<tr>
<th>Justice</th>
<th>Pref.</th>
<th>Prec.</th>
<th>% Pref.</th>
<th>Preferences (%)</th>
<th>Precedent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Strong (1)</td>
<td>Moderate (2)</td>
</tr>
<tr>
<td>Locke</td>
<td>1</td>
<td>5</td>
<td>16.67</td>
<td>1(100)</td>
<td></td>
</tr>
<tr>
<td>J. W. Estey</td>
<td>4</td>
<td>1</td>
<td>80</td>
<td>2(50)</td>
<td>2(50)</td>
</tr>
<tr>
<td>Cartwright</td>
<td>13</td>
<td>9</td>
<td>59.1</td>
<td>4(30.8)</td>
<td>2(15.4)</td>
</tr>
<tr>
<td>Martland</td>
<td>8</td>
<td>4</td>
<td>66.7</td>
<td>4(50)</td>
<td>2(25)</td>
</tr>
<tr>
<td>Kerwin</td>
<td>2</td>
<td>1</td>
<td>66.7</td>
<td>2(100)</td>
<td></td>
</tr>
<tr>
<td>Rand</td>
<td>1</td>
<td>2</td>
<td>33.3</td>
<td>1(100)</td>
<td></td>
</tr>
<tr>
<td>Fauteux</td>
<td>3</td>
<td>0</td>
<td>100</td>
<td>1(33.3)</td>
<td></td>
</tr>
</tbody>
</table>

| Totals  | 32    | 22    | 59.3    | 11(34.4)     | 10(31.2)      | 11(34.4)    | 8(36.4)    | 12(54.5)   | 2(9.1)   |

Table 4.8 presents the total number of preferential and precedential votes for Justices Locke, Estey, Cartwright, Martland, Kerwin, Rand, and Fauteux. Combined, these Justices voted according to their preferences in 59.3 percent of the progeny cases. Conversely, 40.7 percent of the progeny votes are attributed to the influence of precedent. Justice Locke had the highest percentage of precedential votes, 83.3 percent versus 16.7 percent preferential.

Locke J. changed his vote in five progeny, meaning that he acceded to the position from which he dissented in the precedent case. Justice Locke’s only preferential vote came in Archibald et al. v. Nesting et al., in which he dissented based on his earlier dissent from Marsden Kooler Trans. Ltd. et al. v. Pollock. Under the coding conventions used by Segal

---

and Spaeth, Locke's vote in *Archibald* is classified as "strong preferential" since he referred to his dissent in the precedent case.

Justice Cartwright's votes in *Mann v. The Queen*\(^{32}\) and *McIver v. The Queen*\(^{33}\) provide excellent examples of "strong precedential" behaviour. The decisions in *Mann* and *McIver* relied on the Court's judgment in *O'Grady v. Sparling*, a case dealing with the validity of provincial careless driving laws.\(^{34}\) Although Cartwright dissented in *O'Grady*, he authored concurring opinions in both of its progeny which explicitly follow the majority opinion from *O'Grady*. For this reason, Cartwright's progeny votes were coded as "strong precedential."

<table>
<thead>
<tr>
<th>Justice</th>
<th>Pref.</th>
<th>Prec.</th>
<th>% Pref.</th>
<th>Preferences (%)</th>
<th>Precedent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Strong (1)</td>
<td>Moderate (2)</td>
</tr>
<tr>
<td>Taschereau</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>1 (100)</td>
<td>1 (100)</td>
</tr>
<tr>
<td>Abbott</td>
<td>2</td>
<td>1</td>
<td>66.7</td>
<td>1 (50)</td>
<td>1 (50)</td>
</tr>
<tr>
<td>Spence</td>
<td>17</td>
<td>3</td>
<td>85</td>
<td>1 (5.9)</td>
<td>11 (64.7)</td>
</tr>
<tr>
<td>Hall</td>
<td>3</td>
<td>0</td>
<td>100</td>
<td>3 (100)</td>
<td></td>
</tr>
<tr>
<td>Judson</td>
<td>9</td>
<td>5</td>
<td>64.3</td>
<td>2 (22.2)</td>
<td>3 (33.3)</td>
</tr>
<tr>
<td>Ritchie</td>
<td>8</td>
<td>5</td>
<td>61.5</td>
<td>3 (37.5)</td>
<td>2 (25)</td>
</tr>
<tr>
<td>Pigeon</td>
<td>4</td>
<td>2</td>
<td>66.7</td>
<td>1 (25)</td>
<td>2 (50)</td>
</tr>
<tr>
<td>Totals</td>
<td>43</td>
<td>17</td>
<td>71.7</td>
<td>8 (18.6)</td>
<td>22 (51.2)</td>
</tr>
</tbody>
</table>

The seven Justices presented in Table 4.9 voted consistently with their original revealed preference in 71.7 percent of the progeny cases, and acceded to the position established by precedent in the remaining 28.3 percent. To illustrate weak preferential voting, consider Justice Ritchie's decisions in the progeny of *Vinnal v. The Queen*.\(^{35}\) Specifically, Ritchie participated in four negligence cases that either relied on, or raised similar issues to

---


those in *Vinnal*. Although Ritchie J. did not cite his dissent from *Vinnal*, his votes in the first two progeny cases are consistent with the ideological direction of his vote in *Vinnal*, and are therefore coded as weak preferential.

Perhaps the best example of strong precedential behaviour is the concurring opinion of Justice Judson, which was joined by Spence J., in *Lampard v. The Queen*. *Lampard* is a progeny case of *Sunbeam Co. Ltd. v. The Queen* which was decided in the same year. Justices Judson and Spence dissented in *Sunbeam*, only to accept it as a binding precedent shortly thereafter. In *Lampard*, Judson J. unequivocally stated that the doctrine of *stare decisis* "compelled" him to follow the majority opinion from *Sunbeam*. Although there are other examples of strong precedential voting, the concurrence of Judson J. and Spence J. in *Lampard* is the only case where the Justices openly attribute the decision to vote against their original revealed preference to the influence of precedent.

<table>
<thead>
<tr>
<th>Justice</th>
<th>Pref.</th>
<th>Prec.</th>
<th>% Pref.</th>
<th>Preferences (%)</th>
<th>Precedent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Laskin</td>
<td>13</td>
<td>3</td>
<td>81.3</td>
<td>Strong (1) 2(15.4) Moderate (2) 7(53.8) Weak (3) 4(30.8)</td>
<td>Strong (1) 3(100)</td>
</tr>
<tr>
<td>Dickson</td>
<td>7</td>
<td>8</td>
<td>46.7</td>
<td>3(42.9)</td>
<td>Moderate (2) 3(42.9) Weak (3) 1(14.2)</td>
</tr>
<tr>
<td>de Grandpré</td>
<td>3</td>
<td>1</td>
<td>75</td>
<td>3(100)</td>
<td></td>
</tr>
<tr>
<td>Beetz</td>
<td>1</td>
<td>7</td>
<td>14.3</td>
<td>1(100)</td>
<td></td>
</tr>
<tr>
<td>Lamer</td>
<td>6</td>
<td>6</td>
<td>50</td>
<td>5(83.3)</td>
<td>Moderate (2) 1(16.7) Weak (3) 3(50)</td>
</tr>
<tr>
<td>McIntyre</td>
<td>2</td>
<td>8</td>
<td>20</td>
<td>2(100)</td>
<td></td>
</tr>
<tr>
<td>Le Dain</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>32</td>
<td>36</td>
<td>47.1</td>
<td>10(31.2)</td>
<td>15(46.9)</td>
</tr>
</tbody>
</table>

39 *Lampard*, 382.
The Justices featured in Table 4.10 are the only group that combined to produce more precedential than preferential votes. This group of Justices voted consistently with existing precedent in 52.9 percent of the progeny cases, while 47.1 percent of the votes conform to preferential voting. Justice Bora Laskin, who served on the Court for nearly fourteen years, eleven of which were as Chief Justice, had the highest proportion of preferential votes with 81.3 percent. This is to be expected given Laskin’s reputation as a fiercely independent Justice who was often in dissent, especially in criminal law cases. Justice Laskin’s votes in the three progeny cases of Hogan v. The Queen are illustrative of this point. Hogan involved the right of individuals to retain counsel before submitting to a breathalyser. Laskin dissented in the three Hogan progeny cases, citing his original dissent in each.

Justices Beetz and McIntyre stand out as having the largest proportion of precedential votes compared to the other Justices in Table 4.10. Justice Beetz voted according to precedent in 85.7 percent of the progeny cases, while McIntyre followed stare decisis in 80 percent. In Ross Southward Tire v. Pyrotech Products, Justice Beetz dissented from the majority regarding the apportionment of liability following an accidental fire. The majority held that, under the terms of the insurance policy, the landlord could recover damages for a fire caused by the tenant. Justices Beetz and de Grandpré dissented, arguing that the insurance policy did not cover the fire, and that the landlord should seek damages from the tenant. However, Beetz accepted the majority judgment from Ross two years later in T.

41 Hogan v. The Queen, [1975] 2 S.C.R. 574.
44 Ibid.
45 Ibid.
Eaton Company v. Smith et al.\textsuperscript{46}, and again two years after that, in Greenwood Shopping Plaza v. Beattie.\textsuperscript{47}

Justice McIntyre’s votes in the progeny of R. v. Collins are prime examples of weak precedential behaviour. At issue in Collins was the admissibility of evidence under sections 24 (1) and (2) of the Charter. Justice McIntyre dissented in Collins, arguing that although the search was unreasonable, the evidence should be admitted since its admission would not bring the “administration of justice into disrepute.”\textsuperscript{48} However, in three subsequent decisions based on Collins, McIntyre’s votes were consistent with the ideological direction of the majority opinion in Collins.\textsuperscript{49} Hence, Justice McIntyre’s votes in the Collins progeny are coded as weak precedential.

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|c|c|c|c|c|}
\hline
Justice & Pref. & Prec. & % Pref. & Preferences (%) & Precedent (%) \\
\hline
Wilson & 10 & 1 & 91 & Strong & Moderate & Weak \\
\hline
La Forest & 4 & 2 & 66.7 & 4(100) & 2(20) & 1(100) \\
\hline
W. Z. Estey & 1 & 4 & 20 & 4(100) & & 4(100) \\
\hline
L’Heureux-Dubé & 28 & 3 & 90.3 & 16(57.1) & 12(42.9) & 1(33.3) & 2(66.7) \\
\hline
Sopinka & 11 & 3 & 78.6 & 11(100) & & 2(66.7) & 1(33.3) \\
\hline
McLachlin & 15 & 1 & 93.8 & 8(53.3) & 7(46.7) & & 1(100) \\
\hline
Cory & 1 & 0 & 100 & & & 1(100) & \\
\hline
\hline
Totals & 70 & 14 & 83.3 & 44(62.9) & 24(34.3) & 2(2.8) & 1(7.1) & 12(85.8) & 1(7.1) \\
\hline
\end{tabular}
\caption{Preferential and Precedential Votes by Justice}
\end{table}


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
The Justices in Table 4.11 combined to produce the second highest percentage of preferential votes, at 83.3 percent. The Justices conform to precedent in only 16.7 percent of the cases. Justice W. Estey is the only member of the group that appears to have been substantially influenced by precedent. Conversely, Justices Wilson, L’Heureux-Dube, and McLachlin rarely vote according to precedent. Although the data suggests that precedent has a very limited degree of influence on the votes of these Justices, an examination of their individual voting patterns reveals that they are among the most consistent members of the Court in terms of conforming to their past positions.

For example, consider the most frequent preferential voter, Justice L’Heureux-Dubé. The results reported here support the findings of previous research, discussed in Chapter Two, that she consistently supports the position of equality rights claimants and opposes the position of criminal rights claimants. In her dissenting opinion from R. v. Martineau, L’Heureux-Dubé J. voted to uphold the constructive murder provisions of the criminal code whereas the majority ruled that the provisions violated Section 7 of the Charter. She continued to oppose similar criminal rights claims in four progeny cases, citing her dissenting opinion from Martineau in each. Moreover, Justice L’Heureux-Dubé’s propensity to support equality rights claimants is evident in the progeny cases of Symes v. Canada. Overall, the results here regarding the ideological direction of Justice L’Heureux-Dubé’s votes in progeny decisions demonstrate her attachment to preferential voting particularly in criminal rights and equality rights cases.

---


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 4.12
Preferential and Precedential Votes by Justice

<table>
<thead>
<tr>
<th>Justice</th>
<th>Pref.</th>
<th>Prec.</th>
<th>% Pref.</th>
<th>Preferences (%)</th>
<th>Precedent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Strong (1)</td>
<td>Moderate (2)</td>
</tr>
<tr>
<td>Gonthier</td>
<td>7</td>
<td>0</td>
<td>100</td>
<td>2(28.6)</td>
<td>5(71.4)</td>
</tr>
<tr>
<td>Major</td>
<td>4</td>
<td>0</td>
<td>100</td>
<td>3(75)</td>
<td>1(25)</td>
</tr>
<tr>
<td>Bastarache</td>
<td>3</td>
<td>1</td>
<td>75</td>
<td>2(66.7)</td>
<td>1(33.3)</td>
</tr>
<tr>
<td>Arbour</td>
<td>3</td>
<td>1</td>
<td>75</td>
<td>3(100)</td>
<td></td>
</tr>
<tr>
<td>Binnie</td>
<td>2</td>
<td>0</td>
<td>100</td>
<td></td>
<td>2(100)</td>
</tr>
<tr>
<td>LeBel</td>
<td>3</td>
<td>0</td>
<td>100</td>
<td>1(33.3)</td>
<td>2(66.7)</td>
</tr>
<tr>
<td>Deschamps</td>
<td>1</td>
<td>0</td>
<td>100</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>23</td>
<td>2</td>
<td>92</td>
<td>12(52.2)</td>
<td>11(47.8)</td>
</tr>
</tbody>
</table>

Although the number of progeny votes in Table 4.132 is substantially smaller than in Tables 4.8 - 4.11, the data fit into a pattern of increased preferential voting, particularly by the more recent Justices. Because they are relatively new to the Court, Justices LeBel and Deschamps have not participated in enough cases to make any conclusions as to whether they are influenced by precedent in their decision-making. However, if the past behaviour of other Justices is any indicator, it is reasonable to expect that considerations of *stare decisis* will have a minimal influence on their votes.
Table 4.13
Combined List of Preferential and Precedential Votes by Justice

<table>
<thead>
<tr>
<th>Justice</th>
<th>Pref.</th>
<th>Prec.</th>
<th>% Pref.</th>
<th>Preferences (%)</th>
<th>Precedent (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Strong (1)</td>
<td>Moderate (2)</td>
</tr>
<tr>
<td>Locke</td>
<td>1</td>
<td>5</td>
<td>16.67%</td>
<td>1(100)</td>
<td>2(50)</td>
</tr>
<tr>
<td>J. W. Estey</td>
<td>4</td>
<td>1</td>
<td>80%</td>
<td>2(50)</td>
<td>2(50)</td>
</tr>
<tr>
<td>Cartwright</td>
<td>13</td>
<td>9</td>
<td>59.1%</td>
<td>4(30.8)</td>
<td>2(15.4)</td>
</tr>
<tr>
<td>Martland</td>
<td>8</td>
<td>4</td>
<td>66.7%</td>
<td>4(50)</td>
<td>2(25)</td>
</tr>
<tr>
<td>Kerwin</td>
<td>2</td>
<td>1</td>
<td>66.7%</td>
<td></td>
<td>2(100)</td>
</tr>
<tr>
<td>Rand</td>
<td>1</td>
<td>2</td>
<td>33.3%</td>
<td>1(100)</td>
<td></td>
</tr>
<tr>
<td>Fauteux</td>
<td>3</td>
<td>0</td>
<td>100%</td>
<td>1(33.3)</td>
<td></td>
</tr>
<tr>
<td>Taschereau</td>
<td>0</td>
<td>1</td>
<td>0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Abbott</td>
<td>2</td>
<td>1</td>
<td>66.7%</td>
<td>1(50)</td>
<td>1(50)</td>
</tr>
<tr>
<td>Spence</td>
<td>17</td>
<td>3</td>
<td>85%</td>
<td>1(5.9)</td>
<td>11(64.7)</td>
</tr>
<tr>
<td>Hall</td>
<td>3</td>
<td>0</td>
<td>100%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judson</td>
<td>9</td>
<td>5</td>
<td>64.3%</td>
<td>2(22.2)</td>
<td>3(33.3)</td>
</tr>
<tr>
<td>Ritchie</td>
<td>8</td>
<td>5</td>
<td>61.5%</td>
<td>3(37.5)</td>
<td>2(25)</td>
</tr>
<tr>
<td>Pigeon</td>
<td>4</td>
<td>2</td>
<td>66.7%</td>
<td>1(25)</td>
<td>2(50)</td>
</tr>
<tr>
<td>Laskin</td>
<td>13</td>
<td>3</td>
<td>81.3%</td>
<td>2(15.4)</td>
<td>7(53.8)</td>
</tr>
<tr>
<td>Dickson</td>
<td>7</td>
<td>8</td>
<td>46.7%</td>
<td>3(42.9)</td>
<td>3(42.9)</td>
</tr>
<tr>
<td>de Grandpre</td>
<td>3</td>
<td>1</td>
<td>75%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Beetz</td>
<td>1</td>
<td>7</td>
<td>14.3%</td>
<td></td>
<td>1(100)</td>
</tr>
<tr>
<td>Lamer</td>
<td>6</td>
<td>6</td>
<td>50%</td>
<td>5(83.3)</td>
<td>1(16.7)</td>
</tr>
<tr>
<td>McIntyre</td>
<td>2</td>
<td>8</td>
<td>20%</td>
<td></td>
<td>2(100)</td>
</tr>
<tr>
<td>Le Dain</td>
<td>0</td>
<td>3</td>
<td>0%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wilson</td>
<td>10</td>
<td>1</td>
<td>91%</td>
<td>4(40)</td>
<td>4(40)</td>
</tr>
<tr>
<td>La Forest</td>
<td>4</td>
<td>2</td>
<td>66.7%</td>
<td>4(100)</td>
<td></td>
</tr>
<tr>
<td>W. Z. Estey</td>
<td>1</td>
<td>4</td>
<td>20%</td>
<td></td>
<td>1(100)</td>
</tr>
<tr>
<td>L'Heureux-Dubé</td>
<td>28</td>
<td>3</td>
<td>90.3%</td>
<td>16(57.1)</td>
<td>12(42.9)</td>
</tr>
<tr>
<td>Sopinka</td>
<td>11</td>
<td>3</td>
<td>78.6%</td>
<td>11(100)</td>
<td></td>
</tr>
<tr>
<td>McLachlin</td>
<td>15</td>
<td>1</td>
<td>93.8%</td>
<td>8(53.3)</td>
<td>7(46.7)</td>
</tr>
<tr>
<td>Cory</td>
<td>1</td>
<td>0</td>
<td>100%</td>
<td></td>
<td>1(100)</td>
</tr>
<tr>
<td>Gonthier</td>
<td>7</td>
<td>0</td>
<td>100%</td>
<td>2(28.6)</td>
<td>3(75)</td>
</tr>
<tr>
<td>Major</td>
<td>4</td>
<td>0</td>
<td>100%</td>
<td>3(75)</td>
<td>1(25)</td>
</tr>
<tr>
<td>Bastarache</td>
<td>3</td>
<td>1</td>
<td>75%</td>
<td>2(66.7)</td>
<td>1(33.3)</td>
</tr>
<tr>
<td>Arbour</td>
<td>3</td>
<td>1</td>
<td>75%</td>
<td>3(100)</td>
<td></td>
</tr>
<tr>
<td>Binnie</td>
<td>2</td>
<td>0</td>
<td>100%</td>
<td></td>
<td></td>
</tr>
<tr>
<td>LeBel</td>
<td>3</td>
<td>0</td>
<td>100%</td>
<td>1(33.3)</td>
<td></td>
</tr>
<tr>
<td>Deschamps</td>
<td>1</td>
<td>0</td>
<td>100%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total 200 91 68.7 85(29.2) 82(28.2) 33(11.3) 17(5.8) 61(21) 13(4.5)

Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
Table 4.13 combines the data from Tables 4.8 – 4.12, and shows the total number of preferential and precedential votes. Eighteen of the thirty-five Justices voted according to their preferences in 68 percent or more of the progeny cases which corresponds to a high level of preferential expression. This confirms the first hypothesis that a majority of Justices exhibit strong levels of preferential behaviour. Although it is only a slight majority (51.2 percent), the data are sufficient to accept the hypothesis that most Justices on the Supreme Court of Canada conform to their personal preferences more often than to precedents.

The Court’s overall support for precedent in progeny cases since 1950 stands at 31.3 percent, which is considered a weak level of influence. In contrast, 68.7 percent of the total votes cast in progeny cases were consistent with the justices’ original revealed preference. Together, the weak level of precedential voting and strong level of preferential voting supports the expectation of the second hypothesis, which is that the decision-making of the Court as a whole is influenced more by the personal preferences of the Justices than by the doctrine of *stare decisis.*
Chapter 5

Conclusion

In summary, the findings of the research reported here do not bear out the conventional wisdom that precedent has a substantial influence on the decisions of the Justices on the Supreme Court of Canada. While the content analysis shows that the Justices frequently use precedent and other variables associated with the legal model to justify their decisions, additional research proves that precedent has a minimal influence on how the Justices decide cases. In particular, an examination of precedent-altering judgments demonstrates that, with the exception of a few Justices, *stare decisis* rarely influences the decisions of the Supreme Court of Canada. The same conclusion holds true for ordinary cases where precedential influence was slightly greater than in precedent-altering decisions, but still low enough to be classified as having a weak influence on the Justices’ decisions. Accordingly, these results support the findings of American researchers that the attitudinal model provides a better explanation of how judges decide cases.

Interestingly, when the results from studies 2 and 3 are combined, the Justices with the highest rates of conformity to precedent were all appointed to the Supreme Court either by Prime Minister John Diefenbaker, or P.E. Trudeau. Specifically, Justices Martland and Judson were appointed by P.M. Diefenbaker in 1958, followed a year later by Justice Roland Ritchie. As Prime Minister, Trudeau appointed Justices Dickson, Beetz, and McIntyre to the Supreme Court between 1973 and 1979. Compared to the other members of the Court since 1950, these six Justices were the most supportive of the legal model version of *stare decisis*.

In addition, these Justices are united by the fact that they were all appointed before the introduction of the Charter of Rights and Freedoms in 1982. Prior to the Charter era, the Supreme Court of Canada was regarded as an extremely conservative institution in that the Justices were reluctant to invalidate legislation or to disturb existing precedents. As the
results of study 2 indicate, the number of precedent-altering decisions significantly increased following the entrenchment of the Charter. This suggests that the Charter brought about a change in how Supreme Court Justices view their role in society.

In the Charter era, the conservative conception of the judicial function has been replaced by one which emphasizes the need for judicial creativity and a greater willingness to pass judgment on the content of legislation. Thus, the relatively high rate of conformity to precedent demonstrated by Justices Martland, Judson, Ritchie, Dickson, Beetz, and McIntyre, may be, at least in part, a function of the conservative culture of Canadian law which prevailed throughout most of their judicial careers. This explanation is further supported by the declining rates of precedential influence among the Justices who were appointed after the introduction of the Charter.

The results reported here imply that precedent has a weak influence on the decision-making of the majority of Justices on the Supreme Court of Canada. However, when compared to the findings of American researchers, the data reveal that the Court as a whole conforms to institutional *stare decisis* at a rate that is nearly three times higher than the U.S. Supreme Court. For example, Segal and Spaeth found that since 1960, the Justices on the U.S. Supreme Court switched their vote to the position from which they originally dissented in 9.2 percent of the progeny cases. Conversely, the Justices on the Supreme Court of Canada conformed to precedent in 31.3 percent of the progeny cases. Thus, from a comparative perspective, the Justices on the Supreme Court of Canada appear to be more influenced by institutional *stare decisis* than their American counterparts.

While this analysis has assessed the influence of *stare decisis* on judicial decision-making, it has avoided making any normative claims regarding the desirability of adhering to

---

precedent. Rather than arguing that judges should or should not follow precedent, it is limited exclusively to the question of influence. However, the growing incidence of preferential voting has serious implications for the principle of predictability. In particular, judges must ensure that they strike the proper balance between legal continuity and predictability, and the need to update the law by altering established precedents. Consequently, its purpose has been to test the conventional wisdom that precedent is the fundamental principle of judicial decision-making. While the results do not support the conventional wisdom, neither do they completely rule out the influence of precedent on judicial decision-making.

For this reason, additional research is needed into legal and attitudinal factors that affect judicial decision-making in Canada. This, in turn, requires broadening the study of law beyond the traditional concern with legal rules to include an understanding of how personalities and preferences shape judicial decisions. Only when the mythology of judging is deconstructed and the barriers separating legal scholarship and the social sciences are removed, will it be possible to truly know whether the Justices on the Supreme Court of Canada take precedent seriously.

\[2\] Ibid., 971.
APPENDIX A:
Cases included in the Content Analysis


Lefebvre (Trustee of); Tremblay (Trustee of), [2004] 3  S.C.R. 326, 2004 SCC 63.


## Appendix B:
Altered and Altering Decisions

<table>
<thead>
<tr>
<th>Altering Decisions</th>
<th>Altered Decisions</th>
<th>Method of Alteration</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Paquette v. The Queen</strong> [1977] 2 S.C.R. 189, at 197</td>
<td>Dunbar v. The King [1936] 67 C.C.C. 20 (S.C.C.)</td>
<td>Overruled</td>
<td>Decision was wrong</td>
</tr>
<tr>
<td><strong>McNamara Construction Ltd. v. The Queen</strong> [1977] 2 S.C.R. 654, at 661</td>
<td>Farwell v. The Queen [1894] 22 S.C.R. 553</td>
<td>Overruled</td>
<td>Decision was wrong</td>
</tr>
</tbody>
</table>
### Appendix B: Continued

<table>
<thead>
<tr>
<th>Altering Decisions</th>
<th>Altered Decisions</th>
<th>Method of Alteration</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Hepton v. Maat [1957]</em> S.C.R. 606</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Re. Agar, McNeil v. Agar [1958]</em> S.C.R. 52</td>
<td></td>
<td></td>
</tr>
<tr>
<td><em>Schuldt v. The Queen [1985]</em> 2 S.C.R. 592</td>
<td><em>R. v. Lemire [1965]</em> S.C.R. 174</td>
<td>Not Followed</td>
<td>Decision was wrong</td>
</tr>
<tr>
<td></td>
<td><em>Wild v. The Queen [1971]</em> S.C.R. 101</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Guarantee Co. of North America v. Aqua-Land Exploration Ltd. [1966]</em> S.C.R. 133</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td><em>Clark v. Scottish Imperial Insurance Co. [1879]</em> 4 S.C.R. 192</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Appendix B: Continued

<table>
<thead>
<tr>
<th>Altering Decisions</th>
<th>Altered Decisions</th>
<th>Method of Alteration</th>
<th>Reason</th>
</tr>
</thead>
<tbody>
<tr>
<td>Altering Decisions</td>
<td>Altered Decisions</td>
<td>Method of Alteration</td>
<td>Reason</td>
</tr>
<tr>
<td>---------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
Appendix C:
Precedent and Progeny Cases


The King v. The Assessors of the Town of Sunny Brae, [1952] 2 S.C.R. 76.


Azoulay v. The Queen, [1952] 2 S.C.R. 495.


Hogan v. The Queen, [1975] 2 S.C.R. 574.
Pappajohn v. The Queen, [1980] 2 S.C.R. 120.


BIBLIOGRAPHY


Black’s Law Dictionary. 7th ed.


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.


Slayton, Philip. "A Critical Comment on Scalogram Analysis of Supreme Court of

Smith, Jeffrey, and Jo Becker. "Sifting Old, New Writings For Roberts's Philosophy." 
available from http://www.washingtonpost.com/wp-dyn/content/article/2005/
/08/20/AR2005082001325_pf.html.

Songer, Donald R. and Stefanie A. Lindquist. "Not the Whole Story: The Impact of
Justices' Values on Supreme Court Decision Making." American Journal of

Spaeth, Harold J. and Jeffrey A. Segal. Majority Rule or Minority Will: Adherence
to Precedent on the U.S. Supreme Court. New York: Cambridge University

Stephens, Michael K. "Fidelity to Fundamental Justice: An Originalist Construction of
Section 7 of the Canadian Charter of Rights and Freedoms." National Journal of


Tate, Neal. "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court

Tate, Neal. "The Methodology of Judicial Behavior Research: A Review and Critique." 

Tate, Neal, and Panu Sittiwong. "Decision Making in the Canadian Supreme Court:
Extending the Personal Attributes Model across Nations." Journal of Politics 51,

Taversky, Amos and Daniel Kahneman. "The Framing of Decisions and the Psychology

Report prepared by the Congressional Research Service. Washington D.C.:


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.


Reproduced with permission of the copyright owner. Further reproduction prohibited without permission.
CASES CITED


Hogan v. The Queen, [1975] 2 S.C.R. 574.


Practice Statement (Judicial Precedent), [1966] 1 W.L.R. 1234 (H.L.).


Re Ng Extradition, [1991] 2 S.C.R. 858.


Viro v. The Queen, [1978] 141 C.L.R. 88 (H.C. Aust.).


VITA AUCTORIS

Mark Chalmers was born in 1980 in Windsor, Ontario. He graduated from Northern Collegiate High School in Sarnia, Ontario in 1999. From there he went on to Central Michigan University before transferring to the University of Windsor in 2000 where he obtained a B.A. (Hon.) in Political Science. He is currently a candidate for a Master’s degree in Political Science at the University of Windsor and hopes to graduate in Fall 2005.