Osgoode Hall Law Journal

Volume 7, Number 1 (November 1969)

Article 3

The Supreme Court of Canada: A Biographical Study

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THE SUPREME COURT OF CANADA A BIOGRAPHICAL STUDY

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Introduction

The Supreme Court of Canada was established in 1875, under the express authority of the British North America Act (s.101), to exercise appellate civil and criminal jurisdiction for the Dominion.[1]

The Supreme Court was originally composed of a Chief Justice and five judges, the number of judges being raised to six in 1927 and nine in 1949.[2] It had, from its inception, a representative federal character. The Act always provided that at least two, and now three of the judges should come from Quebec. The Act made no guarantee to any province except Quebec, but the practice of giving sectional representation on the Court has been firmly established by custom for very many years.[3] The late Ernest Lapointe, Minister of Justice, made the following admission in 1927:

> While geographical conditions should not be considered in the appointment of judges, because the best possible men should be appointed to the Supreme Court of Canada, there is one exception, namely, that two judges will always be members of the Bench or bar of Quebec, familiar with the civil law and procedure of that province. Apart from that, there is no geographical condition mentioned in the Act. I must say, however, that since the creation of the Court such considerations have been taken into account in making appointments; there is one judge usually supposed to be a member of the bar or Bench of the Maritime Provinces, two come from Quebec, two have usually been appointed from Ontario, and one judge is usually appointed from the Bench of British Columbia. The prairie provinces were not then developed as they are today, and up to the present there has not been a judge from either the bar or the Bench of any of those provinces.[4]

The prairie provinces soon realized this ambition as Parliament in the same year increased the numbers of the Supreme Court by one; and the first appointment to the new judgeship came from the province of Saskatchewan.[5]

The judges are appointed by the Governor-General on the advice of the Cabinet and hold office during good behaviour with compulsory retire-

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[1] Can. Statutes, 38 Vict. c.11. *See* Frank Mackinnon, *The Establishment of the Supreme Court of Canada,* CANADA HISTORICAL REVIEW, September 1946, pp. 258-74.

[2] R. Macregor Dawson, THE GOVERNMENT OF CANADA, 4th ed., Toronto: U. of Toronto Press, 1963), 428.

[3] *Id.,* 429.

[4] Can. H. of C. Debates, March 10, 1927, p. 1079. Mr. Lapointe must be speaking only of Alberta and Saskatchewan, as Mr. Justice Killam, appointed to the Supreme Court in 1903, had ben the Chief Justice of the Court of Queen's Bench of Manitoba.

[5] Mr. Justice Lamont, appointed 1927.

ment at seventy-five. They may be removed by the Governor-General-in-Council following a joint address by both Houses of Parliament.

This type of biographical study represents a stepping stone, albeit a small one, to future behavioural studies, predicted by Professor Sidney Peck, as adding "a new dimensation to the lawyer's understanding of the court's role in the nation's political life".[7] Far too often in the past, observers of Western political systems have disregarded the role the courts play in the political process. For instance, in his studies of the American system, C. Wright Mills did not place one American Supreme Court Justice in any of his "elites". To his credit, John Porter does place the Canadian Supreme Court Justices in his "political elite", but he disposes of them in a manner far too superficial.[8]

Interest in the behavioural approach is increasing in Canada and reflects an attitude that the action of a court is just another aspect of political behaviour. This type of approach is all part of a massive re-examination of judicial review and its efficacy. Serious questions have been raised as to whether judicial activism or restraint should be at the heart of the judicial process in the area of constitutional adjudication and whether the judicial process at the highest level of constitutional decision can be objective.[9]

The prime purpose of this paper is mainly one of collection. Nowhere has biographical information on the members of the Supreme Court of Canada been collected and categorized in an orderly fashion. Inferences which have been drawn from the data are purely incidental and subsidiary; and this study does not attempt to relate the biographical data to the decision-making process. Nor does the study draw any definite conclusions about the selection process other than those which are self-evident, given the data presented.

Given the limits of this particular study, it does have important implications. Such data has more or less importance depending on one's view of the judicial process and the concomitant role the judge plays in that process.[10]

Judicial recruitment is of vital concern to those who view the judge's role as one primarily of policy-making or legislating. The judge is viewed as a political actor who makes decisions and is influenced by forces not unlike any other political decision-maker having particular policy to implement.[11] The assumption stemming from this model is that the recruitment system that is used will substantially influence the type of candidates who come forward. Implicit in this assumption is another assumption stating that the 'socializa-

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[6] R.S.C. 1952, c. 159, s. 4.

[7] S. R. Peck, *The Supreme Court of Canada 1958-1966: A Search for Policy Through Scalogram Analysis* (1967), 45 CAN. B. REV. 666.

[8] John Porter, THE VERTICAL MOSAIC, (Toronto: U. of Toronto Press, 1956), 366-416.

[9] A. S. Miller and R. F. Howell, *The Myth of Neutrality;* contained in JUDICIAL REVIEW AND THE SUPREME COURT, edited by L. W. Levy, (New York: Harper & Row, 1967).

[10] See Paul Weiler, *Two Models of Judicial Decision-Making* (1968), 46 CAN. B. REV. 406. See pp. 439-443 for implications of selection.

[11] *See* JUDICIAL BEHAVIOUR, edited by Glendon Schubert (Chicago: Rand, McNally, 1964), for a collection of such articles.

tion processes' affect the values and viewpoints of the judges recruited by the system.

Recruitment is a generalized description of a variety of activities designed to produce judges with certain types of training, certain sets of values, and certain sets of expectations.[12]

Judicial selection comes near the end of the judicial recruitment process. It acts to reinforce the socialization process by choosing those lawyers who have conformed to the established norms and who therefore give promise of fulfilling the judicial role in an expected manner. The norms of selection give the initial cues as to the type of training and preparation which might lead to the Supreme Court Bench.[13]

Assuming the policy-making outlook of the judicial process is rejected in favour of a philosophy which conceives of the judge as the adjudicator of specific, concrete disputes, who disposes of the problems by elaborating and applying a legal regime of facts, which he finds on the basis of evidence and argument presented to him in an adversary process, the criterion of selection or its characteristics still maintain particular importance. Cardozo recognized its importance in saying:

> All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions, and the result is an outlook on life, a conception of social needs, a sense in James' phrase of the total push and pressure of the cosmos, which, when reasons are nicely balanced, must determine where choice shall fall.[14]

In Canada, pressures to overturn the traditional confinement of judicial appointments to members of the party that have the choice, represent an awareness of the possible effects of the selection process.[15]

J. D. Clark asks that the Canadian Bar Association, which at that time represented 4,682 of the 10,000 lawyers in Canada, make known that they demand judicial selection be based on the respect with which a man is held by bench and bar for his integrity, his legal attainments and judicial qualities. Clark's request was based on a fear articulated as follows:

> I can conceive of nothing more subversive to the interests of the state than that pressure from those concerned with political expediency and party loyalty should be the determining factor in appointments to the bench.

Andrew D. MacLean, at one time secretary to Mr. Bennett, said of the Prime Minister's task of selection:

> In choosing men for appointment he would like to make merit the chief consideration. Instead, he has found that party, race, religion, occupation and geographical location of the nominee are more important than his qualifications. He dislikes this

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[12] Joel B. Grossman, LAWYERS AND JUDGES, (New York: John Wiley & Sons, 1965), 200.

[13] *See* Krislov, THE SUPREME COURT IN THE POLITICAL PROCESS (1965) — similar approach to U.S. Supreme Court, pp. 22-31.

[14] Benjamin N. Cardozo, THE NATURE OF THE JUDICIAL PROCESS, (New Haven: Yale University Press, 1921).

[15] W. H. Angus, *Judicial Selection in Canada—Historical Perspective* (1967), 1 CAN. LEG. STUDIES 220; J. D. Clark, *Appointments to the Bench* (1952), 30 CAN. B. REV. 29; Angus, *Appointing Canadian Judges* (1966), 149 AM. JUD. SOC. 224.

> deference to political sentiment, and has said so repeatedly. Appointments made by the party for party reasons are anathema to him. He wants a man of integrity, of capacity, and if such man happens to be a political enemy, that makes no difference.[16]

The writers asked themselves what was the significance of biographical data of our Supreme Court Justices. We found direction in an illuminating article by Professors Miller and Howell, called *The Myth of Neutrality in Constitutional Ajudication.*[17] The authors' thesis is that judicial decision-making is a "species of human thought and human choice" and that therefore adherence to neutral principles in the sense of principles which do not refer to value choices, is impossible in the adjudicative process.[18]

In presenting their argument, Miller and Howell borrow their thoughts on neutrality from other disciplines of human behaviour. The themes running throughout these extra-legal viewpoints were two. First, "choices among values are unavoidable in human knowledge and human activity". Secondly, "when those choices are made they are motivated not by neutral principles or objective criteria, but by the entire biography and heredity of the individual making them". One of the viewpoints presented, that of the historian, Isaiah Berlin, has particular relevance to our study and should be outlined in full:

> For it is plainly a good thing that we should be reminded by social scientists that the scope of human choice is a good deal more limited than we used to suppose; that the evidence at our disposal shows that many of the acts too often assumed to be within the individual's control are not so; that man is an object in nature to a larger degree than has at times been supposed, that human beings more often than not act as they do because of characteristics due to heredity or physical or social environment or education, or biological laws of physical characteristics or the interplay of these factors with each other, and with obscurer factors loosely called physical characteristics, and that the resultant habits of thought, feeling and expression are as capable of being classified and made subject to hypotheses and systematic prediction as the behaviour of material objects and this certainly alters our ideas about the limits of freedom and responsibility.[19]

These are strong words, perhaps too strong, but they nonetheless give significance to a study which has collected the biographical data of men who participate in the human activity of decision-making.

Miller and Howell conclude that the important question is not whether the Justices follow neutral principles, but rather what value preferences do they espouse. These authors propose a "[t]eleological jurisprudence, one purposive in nature rather than impersonal or neutral". In such a system the judge should consciously attempt to articulate his value preferences as he understands them. It is our submission that our society is sophisticated enough to accept and to demand a judge acting in conscious affirmation of a set of values rather than one futilely striving to be impersonal in order to perpetuate the legal fiction of neutrality.

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[16] *See* J. A. Clark, *Appointments to the Bench* (1952), 30 C.B.R. 29.

[17] (1960), 27 U. OF CHICAGO L. REV. 661-95.

[18] For reference to the opposing school of thought see generally: Wechsler, *Toward Neutral Principles of Constitutional Law* (1958), 73 HARV. L. REV. 1; Pollak *Racial Discrimination and Judicial Integrity* (1959), 108 U. PA. REV. 1; Hart, *Forward: The Time Chart of the Justices* (1959), 73 HARV. L. REV. 84.

[19] Berlin, *Historical Inevitability,* 35-36 (1954) noted in Miller & Howell, p. 211, see n. 9.

Possibilities and limits of the Particular Study

The study, classified as a social background analysis, is very similar in form to that by Schmidhauser.[20] Schmidhauser has led the political science discipline in collecting data on the social backgrounds of the Supreme Court justices with the purported objective of formulating some theory about the relationship of such factors to judicial decisions.[21]

T. L. Becker doubts the worth of the many charts and tables presented by Schmidhauser. The major value of such a study, as Becker states, is that it produces information which is capable of being accumulated and stored and which, some time in the near future, may serve as the building blocks for a significant generalization about such a relationship or such relationships.

Historical Periods

As can be seen from Table I, we have broken the Supreme Court's history into seven periods. The seven historical periods are justified by the dominance of a particular individual as prime minister or dominance of a particular party in each. One purpose for distinguishing was to determine whether the historical patterns of judicial recruitment are in conformity with the predominant social and political trends.

Region

Regionalism is a political fact of life in Canada. Presently there are five diverse regions of Canada each with its own political wants and needs. Since regionalism is only one of the many factors that divide this country, the federal political parties have become brokers of public opinion which attempt to create successful coalitions in order to form a Government. This Government of diverse interests is the body that appoints the members of our Supreme Court.

Because of the scope of this paper and because the West did not become a meaningful part of this country until three decades after the formation of the Supreme Court, we have chosen to divide Canada into two regions. For our purposes, French Canada and English Canada are our areas of interest.

What effect does regionalism have on appointments to the Supreme Court? Because of the nature of the country it is suggested that it is an important factor. It is our submission that regionalism plays as great a role to appointments to the Court as it does to appointments to the Cabinet and to the Senate, two other important appointed decision-making bodies in Canada.

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[20] John R. Schmidhauser, *The Justices of the Supreme Court: A Collective Portrait,* MIDWEST JOURNAL OF POLITICAL SCIENCE, (Feb. 1959), 1-57; THE SUPREME COURT (N.Y.: Holt, Reinhart & Winston, 1960); with David Gold, *Scaling Supreme Court Decisions in Relation to Social Background,* 1 PROD (May, 1958), 6-7.

TABLE I

Breakdown and Justification of Historical Periods

Historical Period Ministry	Date	Prime Minister	Opposition	Party
1.	(1) 1.7.1867	Rt. Hon. Sir John Alexander		National Coalition
	(2) 7.11.73	MacDonald Rt. Hon. Alexander Mackenzie	Edward Blake Sir John A. MacDonald	(princ(one) Liberal
	(3) 17.10.78	Rt. Hon. Sir John A. MacDonald	1878 Mackenzie 1882 Blake 1887 Laurier 1891	Conservative
MACDONALD ERA	(4) 16.6.91	Rt. Hon. Sir John Abbott	Laurier	Conservative
	(5) 5.12.92	Rt. Hon. Sir John Thompson	Laurier	Conservative
	(6) 21.12.94	Rt. Hon. Sir Mackenzie Bowell	Laurier	Conservative
	(7) 1.5.96	Rt. Hon. Sir Charles Tupper	Laurier	Conservative
2. LAURIER PERIOD	(8) 11.7.96	Rt. Hon. Sir Wilfred Laurier	1896 Tupper 1900 Tupper 1904 Borden 1908 Borden	Liberal

3. BORDEN/ MEIGHEN PERIOD	(9) 10.10.1911	Rt. Hon. Sir Robt. Borden	Laurier	Conservative Unionist (after 12.10.17)
	(10) 10.7.20	Rt. Hon. Arthur Meighen	W. L. M. King	Unionist
	(11) 29.12.21	Rt. Hon. W. L. M. King	Arthur Meighen	Liberal
	(12) 28.6.26	Rt. Hon. Arthur Meighen	W. L. M. King	Conservative
	(13) 25.9.26	Rt. Hon. W. L. M. King	Arthur Meighen	Liberal
4. BENNETT PERIOD	(14) 7.8.30	Rt. Hon. R. B. Bennett	W. L. M. King	Conservative
5. KING/ ST. LAURENT PERIOD	(15) 23.10.35	Rt. Hon. W. L. M. King 1949	Bennett 1953 Manion 1940 Bracken 1945	Liberal
	(16) 15.11.48	1953 Rt. Hon. L. S. St. Laurent	George A. Drew	Liberal
6. DIEFENBAKER ERA	(17) 21.6.57	Rt. Hon. J. G. Diefenbaker	Laurent 1957 L. B. Pearson 1958	Prog. Conservative
7. PEARSON ERA	(18) 22.4.63	Rt. Hon. L. B. Pearson	John G. Diefenbaker	Liberal

Source: CANADIANA

Of the fifty justices that have been appointed to the Court, about seventy per cent were from English Canada. Twenty-eight per cent, less than a third, came from French Canada (one justice, Cannon, was from both French and English Canada). As it will be seen later, the number of French Canadians appointed is even less because some of the justices from French Canada were of English heritage. This result adds force to the argument of some French Canadians that they have been under-represented on the Court.

At this point we would like to present a period by period survey of appointments by region. The first period is called the Macdonald era, beginning in 1875 and ending in 1896. However, to draw the most meaningful conclusions from the results, this period will be further refined. Sir Alexander Mackenzie, a Liberal, was Prime Minister from 1873-78. In creating the Supreme Court in 1875, he appointed six justices. Four were from English Canada and two from French Canada. It is interesting that one-third were from French Canada because, at this time, Quebec was definitely not part of the Liberal coalition. In the remaining years of this era, six more justices were appointed. Similarly four were from English Canada while two were from French Canada. French Canadians were not under-represented in the latter segment of this era because Quebec was an integral part of the Macdonald-Cartier coalition. Accordingly, in the first period, French Canada contributed one-third of the justices appointed to the Court, roughly the same as the ratio of French Canadians to the whole population.

The next period is the Laurier era. There are many interesting factors which led to his election, of which the most important one was that Quebec had shifted to the Liberal coalition, since Cartier was no longer present to keep the flock on the "blue" side. The Riel rebellion and execution, the Manitoba Schools Question, and the "creeping" British imperialism persuaded French Canadians that it was time for a "rouge" prime minister.

The "First Canadian" appointed ten justices while he occupied the Prime Ministry. It is interesting to discover that he was not as generous to French Canada as either Mackenzie or Macdonald. Of Laurier's appointments, eighty per cent were from English Canada and twenty per cent from French Canada. If region meant little to Laurier, it appears that qualifications played an important role in his appointments. Some of Canada's most famous jurists were appointed by Laurier (e.g. Duff, Davies, Idington, Anglin).

We have called the third period the Borden era. Of all our periods this is probably the least cohesive. It stretches from 1911 to 1930. Borden and Meighen were the Conservative Prime Ministers of this epoch, while King, a Liberal, was Prime Minister for about nine years during the whole period. Throughout these nineteen years only eight judges were appointed, as compared with ten appointments made in the fifteen yera Laurier era. Of the eight judges appointed in the Borden era, six were from English Canada and two were from French Canada. One of King's appointments, Justice Cannon, could be said to be from both English and French Canada. So in this era, fifty-seven per cent were from French Canada and forty-three from English Canada. This over-representation of French Canadians compensated for their under-representation in the Laurier era.

The fourth period is the Bennett era. This is a short five-year period during the depression. R. B. Bennett, a Conservative, appointed four justices, and these were all from English Canada. Even though Bennett was an anglophile, he had reason to appoint only English Canadians as all the vacancies he had to fill were left by English Canadians.

The fifth period is our longest epoch. This is the King-St. Laurent era stretching from 1935 to 1957. If there ever was a period in which judicial appointments would be representative of the population, this would be it. King is reputed to be greatest compromiser in Canadian history, and any appointment that he made was always carefully considered so that it offended no part of his coalition of diverse interests. His and his pupil, St. Laurent's, appointments to the Court reflect this. Of the ten appointments made in this era, seventy per cent were from English Canada and thirty per cent were from French Canada. This pretty well resembled the make-up of the Canadian population.

The next era is the Diefenbaker years from 1957 to 1963, during which the Conservative government passed legislation stipulating that Supreme Court justices must retire at the age of seventy-five. In the "Diefenbaker interlude" four justices were appointed to the Supreme Court, all from English Canada. Mr. Diefenbaker did not have the opportunity to appoint a member from French Canada as Justices Taschereau, Fauteux and Abbott sat throughout his years in office.

Our final period is the Pearson era from 1963 to 1968. Mr. Pearson only appointed two justices and appropriately enough one was from English Canada and one from French Canada. Presently in the Court there are three members from French Canada, the statutorily required number from Quebec.

Before leaving this section on regionalism we would like further to refine our regions in order to include appointments from the Maritimes and the West. The West for our purposes includes the Prairies and British Columbia.

The source of information for this part of the study is from the study of Peter H. Russell: *Bilingualism and Biculturalism in the Supreme Court of Canada.*[22] From the inception of the Court the Maritimes has always been represented, except for a period in the 1920s. In fact, in the premier year of the Court, 1875, the Maritimes had the same number of judges appointed (i.e., 2) as Quebec and Ontario. This situation continued with few exceptions until 1906. As the importance of the Maritimes decreased, so did its representation on the Court. Presently the customary number of Maritime justices on the Court is one. In today's Court this region is represented by Mr. Justice Ritchie.

Unlike the Maritimes, the West did not have representation until 1903. Mr. Justice Killam was born in Nova Scotia but practised law in Winnipeg. However, this representation only lasted until 1905 when Mr. Justice Killam left the bench to become the first chief commissioner of the Board of Railway Commissioners for Canada. In 1927 when the number of seats on the

[22] Prepared for the Royal Commission on Bilingulism and Biculturalism, 1966.

Supreme Court was increased from six to seven, Mr. Justice Lamont from Saskatchewan was appointed. This gave the West two seats on the Court which is its present customary representation. Today the West is represented by Mr. Justice Hall from Saskatchewan and Mr. Justice Martland from Alberta.

In 1949 when the seats on the Supreme Court were increased from seven to nine, a pattern was initiated which subsists today. This pattern of representation is three justices from Quebec (Fauteux, Pigeon, Abbott), three from Ontario (Cartwright, Judson, Spence), two from the West (Hall, Martland) and one from the Maritimes (Ritchie). There appears to be no reason why this pattern will change in the near future.

TABLE II

REGIONAL REPRESENTATION ON THE SUPREME COURT
1875-1968

Year	Q	O	M	W
1875	2	2	2	0
1888	2	3	1	0
1893	2	2	2	0
1903	2	1	2	1
1905	2	2	2	—
1906	2	2	1	1
1924	2	3	0	1
1927	2	3	0	2
1932	2	2	1	2
1949	3	3	1	2
1968	3	3	1	2

Ethnicity

The next topic of discussion is the effect that ethnicity has on appointments to the Supreme Court. This variable is becoming increasingly important in our political system because of the great influx of immigrants after the last war. Because of the disinclination of these groups to assimilate their presence is much more discernible, and their needs are much more explicit. The best description of this Canadian society is the one given by Porter when he described it as a "vertical mosaic" rather than a "melting pot". Because of these "societies within a society" it is assumed that ethnicity weighs heavily on a federal cabinet in making appointments.

It is self-evident that in Canada there are two charter groups, the French and the British. Whether one talks in terms of biculturalism or in terms of "deux nations", the assumption running throughout is that Canada is a nation of two peoples. Porter[23] describes this fact and projects that it will be a continuing fact in Canadian society. He states that "the dominance of the two

[23] Porter, *op. cit.*, 61.

charter groups has never been seriously challenged because of French natural increase and high levels of British immigration. Also, the ethnic structure of a community in terms of its charter and non-charter groups is determined early and tends to be self-perpetuating." Accordingly, it is hypothetized that Canadians of French and British heritage have monopolized appointments to the Supreme Court.

The great immigration periods at the turn of the century and after the Second World War have had a real effect on the cultural make-up of Canada. It is estimated today that thirty per cent of all Canadians are of a non-British or non-French heritage. If this group were ever to become organized, it would certainly be a powerful force within the political system. There are signs of incipient organization in the annual conferences of these groups. However, we are concerned with a period during which these groups were occupied with survival rather than organization, so that it is likely that their effect on judicial appointments was minimal. This is true even of political appointments in which the discretion of the federal government is much less restricted. In fact Porter[24] has pointed out that "[N]ot until Mr. Diefenbaker's administration was the first Treaty Indian appointed to the Senate, the first of Ukrainian origin to the cabinet, and the first of Italian origin as a parliamentary secretary, each appointment being the occasion for newspaper stories about the absence of such appointments in the past." Therefore we predict that the number of appointments of neither French nor British origin to the Supreme Court will be few, if any.

Before we discuss the effect of ethnicity on judicial appointments, we should like to point out a few limitations which must be kept in mind when the results are considered. First, we are describing a period which dates back to 1875. It was not until the post-Second World War era that the non-charter groups became a significant force within the Canadian societal milieu. Secondly, a prerequisite of judicial appointment is a legal education. It should be remembered that the assimilation process from immigration to acculturation and education does not immediately occur. Accordingly it must be expected that the number of judicial appointments from these groups will be very low. Finally, in this section of the paper we are trying to discuss ethnicity within a vacuum. This really cannot be done as Porter points out,[25] because ethnicity is inextricably tied in with religion and social class.

Rather than present a period by period survey, we think it would be more beneficial to describe the final results of our findings. The most noticeable finding is that the overwhelming majority of Supreme Court members were of British heritage. Seventy-four per cent of all justices had a British background. This can be further broken down. Fifty-two per cent were English, twelve per cent were Scottish and ten per cent were Irish. It is interesting to note that in both the Bennett and Diefenbaker eras, only justices of British heritage were appointed.

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[24] *Id.* 71.

[25] *Id.*, 73-91.

TABLE III

Period	1875-1896	1896-1911	1911-1930	1930-1935	1935-1957	1957-1963	1963-1968	Totals
Ethnicity								
French	4 (33%)		4 (50%)		2 (20%)		1 (50%)	11 (22%)
English	5 (41.6%)	6 (60%)	1 (12.5%)	3 (75%)	7 (70%)	4 (100%)		26 (52%)
Scottish	1 (8.3%)	2 (20%)	2 (25%)				1 (50%)	6 (12%)
Irish	2 (16.8%)	1 (10%)		1 (25%)	1 (10%)			5 (10%)
Bi-cultural		1 (10%)	1 (12.5%)					2 (4%)

Our findings add weight to the arguments that French Canadians have been under-represented on the Court. Only twenty-two per cent of the justices were of a French background. Four per cent were bi-cultural. This is not an impressive figure for a people that have consistently made up one-third of our population. One factor contributing to this result is that French Canadians are, as Porter points out, of a lower social standing than English Canadians, and it is predicted that the majority of judicial appointments to the Supreme Court are from the upper classes.

Another factor may be the process of appointment. It has become the custom that three members of the Court must be from Quebec so that there is sufficient expertise in the Court to deal with civil law matters. However, it is customary that one of these members be English Canadian so that the English minority in Quebec is represented. Therefore the system will usually allow only two French Canadians on the Court. Hence French Canadians will be under-represented unless some of their group are appointed from French Canada outside of Quebec. This is not likely to be done, so that the system is likely to perpetuate this French Canadian under-representation on the Court. The one exception was Chief Justice Anglin, who was born in St. John, New Brunswick, but who was of a bi-cultural background.

To make our findings more meaningful we have compared the ethnic backgrounds of judicial appointees with those of appointees to another decision making body in the political system. In his chapter, *The Political Elite,* Porter has figures showing the number of French Canadians appointed to the cabinet during the period 1940-60. We have taken the number (18) of justices who served during this period and have compared their ethnic background to these members of the federal cabinet.

In this period Porter states[26] that of 88 cabinet ministers serving from 1940 to 1960, twenty-six per cent had a French Canadian background. The French Canadians were under-represented in the cabinet. However, the

[26] *Id.* 389.

percentage of French Canadian appointees to the Supreme Court in this period is much smaller. Only sixteen and one-half per cent were from this minority group. It is also interesting to note that this figure is well below the percentage of French Canadians appointed to the Court between 1875 and 1968.

Not only is there no significant contribution to the Court from the other ethnic groups, but in fact, no member of the Supreme Court has been of a non-British or non-French heritage. This result must be considered in light of the limitations previously mentioned. But it still is significant that thirty per cent of our present population has not been represented on the Supreme Court of Canada.[27]

TABLE IV

ETHNICITY—CANADA—1961 CENSUS

NATION OF ORIGIN	POPULATION
United Kingdom	7,996,669
France	5,540,346
Germany	1,049,337
Ukraine	473,337
Italy	450,351
Netherlands	429,679
Scandinavia	386,534
Poland	323,517
Native	120,121
Jewish	173,344
Hungary	126,200
Russia	119,534

It may be helpful at this point to compare these "third force" figures with appointments to the Supreme Court of the United States. In his book *The Supreme Court in the Political Process,*[28] Krislov estimates that eighty-eight per cent of Supreme Court Justices are from the American Charter group, i.e., the British. The other twelve per cent were French, Dutch, Norwegian, German and Iberian. This twelve per cent figure is not substantial but at least in the United States there has been non-Charter representation on the Court. However, there are important factors to consider which decrease the significance of this representation in a comparison with the Canadian Court. First, the American court dates back to 1789 so that it has had nearly a full century over the Canadian Court in which to appoint non-charter members. Secondly, non-British immigration to the United States occurred much earlier than the same to Canada. The assimilation process in the U.S. is largely completed, while the Canadian process is still continuing. Hence non-charter membership on the American Court is much more likely than on the Canadian Court.

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[27] *Id.* During 1940-60, Porter states that 4.5% of the federal cabinet ministers were from this group.

[28] Krislov, *op. cit.*, 3.

To sum up, it can be stated that Canadians of British heritage have monopolized appointments to the Supreme Court of Canada. While French Canadians have been appointed to the Court, they have been definitely under-represented. Finally, no person of a non-British or non-French heritage has ever been appointed to the court.

Religion

The next variable that we will discuss is religion. Before we can decide what effect religion has on appointments to the Supreme Court, we must know what effect religion has in the political system as a whole. Furthermore we must recall that social variables are inseparable from one another.

In the world of Canadian political science a dispute between scholars has arisen as to which social variable has the greatest effect in our political system. Peter Regenstrief, believes that "since 1763, ethnicity has been the most important social variable, subjectively and objectively, in Canadian political life and it gives every indication of continuing to be crucial in the future."[29] However, other studies done by political scientists dispute Regenstrief's theory. A voting survey in North Hamilton shows that "religious affiliation of the respondent is more influential in voting behaviour than any other variable tested".[30] This confirms Robert Alford's conclusion in his book,[31] *Party and Society,* that religion plays the major role in affecting voting behaviour in Canada. Therefore, a major task of the Canadian political party can be seen as interstitial compromises between the different religious groups in Canada. It is submitted that the appeal a party has for a religious group will be reflected in its appointments to the courts, the cabinet, the Senate and the federal civil service.

We agree with a major premise of Porter that ethnicity and religion are inseparable, especially in Canada, and that any discussion as to which is more important is not really relevant. The important thing to realize is that both variables are significant in our political system and that both will weigh heavily on federal appointments.

There is another complicating factor when one discusses religion isolated from other variables. Many sociologists have shown that religion is usually inseparable from class. In describing this relationship, Schmidhauser has stated: "To some denominations attach factors of prestige and social status while others are viewed socially as 'churches of the disinherited,' of unpopular immigrant groups, or of ethnic groups which, because of colour, have not been fully accepted,"[32] In Canada "Catholic religious affiliation tends to be associated with minority groups and lower occupation status."[33] Hence it should be expected that Roman Catholicism will be under-represented in the Supreme Court.

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29 Regenstrief, THE DIEFENBAKER INTERLUDE, (Toronto: Longmans, 1964), 90.

30 G. M. Anderson, *Voting Behaviour and the Ethnic-Religious Variable: A Study of a Federal Election in Hamilton, Ontario* (1966), 32 CAN. J. ECON. POL. SCI. 37:

31 Robert Alford, PARTY AND SOCIETY, (Chicago: Rand McNally, 1963).

32 Schmidhauser, *op. cit.,* 21.

Our data on the religious backgrounds of the Supreme Court justices are not quite complete, since there was insufficient data for seven judges. However, there was enough material to show that as expected Catholics were under-represented. From the available data it appeared that only thirty-six percent were Catholics. This figure is below the ratio of Catholics to the rest of the population in Canada which has consistently been between forty to fifty per cent.[34] However, in every period that we did study, a Catholic was appointed to the Court.

TABLE V

RELIGION—CANADA 1961 CENSUS

RELIGION	POPULATION
Roman Catholic	8,342,826
United	3,664,008
Anglican	2,409,068
Presbyterian	818,558
Lutheran	662,744
Baptist	593,553
Jewish	254,368

Our research showed that fifty per cent of the justices of the Supreme Court have been Protestant. However this group can be further refined. If we accept the division of religions which was used in the Schmidhauser study, our results are quite interesting. Schmidhauser divided various Protestant religions into ones that were of high social order and those of a lower social status. Examples of the former are Anglicans, Presbyterians and French Calvinists. Examples of the latter are Methodists, Baptists and Lutherans. Of this Protestant fifty per cent, the high social status religions contributed thirty-eight of those percentages. That is to say, of all judges appointed to the Court, eighteen per cent was Anglican, eighteen per cent was Presbyterian and two per cent was Hugenot. Of the twenty-five Protestant judges appointed, only four were from one of the low social status religions. Four per cent was Methodist and four per cent was Baptist. These results reinforce our previous statements that in such a study as ours, religion and social class are inseparable.[35]

Finally it should be noted that no Jews or other non-Christians have ever been appointed to the Supreme Court of Canada.

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[33] Porter, *op. cit.*, 389.

[34] *See* 1961 Census.

[35] It should be noted that we have placed the Methodists amongst the lower status churches as Schmidhauser has done. This is clearly inappropriate todays as the Methodists have become a part of the United Church which is not of a lower status. But at the time with which we are concerned (i.e., when these Methodist Justices were appointed) it may be assumed that the Methodists were regarded as of a lower status. This stemmed from the time of the conflict between Ryerson and Strachan in the mid-nineteenth century.

TABLE VI

Religion	1875-1896	1896-1911	1911-1930	1930-1935	1935-1957	1957-1963	1963-1968	Totals
Roman Catholic	5(41.6%)	2 (20%)	5(62.5%)	2 (50%)	2 (20%)	1 (25%)	1 (50%)	18(36%)
Anglican	1 (8.3%)	1 (10%)		1 (25%)	3 (30%)	3 (75%)		9(18%)
Presbyterian	1 (8.3%)	3 (30%)	3(37.5%)	1 (25%)	1 (10%)			9(18%)
Methodist	1 (8.3%)	1 (10%)						2(4%)
Huguenot		1 (10%)						1(2%)
Baptist					2 (20%)			2(4%)
Protestant	3 (25%)	7*(70%)	3(37.5%)	2 (50%)	7 †(70%)	3 (75%)		25(50%)
Unknown	4 (33%)	1 (10%)			1 (10%)		1 (50%)	7(14%)

*Duff was only listed as Protestant
†Rand was only listed as Protestant

We shall compare our results on religion with those of Porter for the Cabinet for the period 1940-1960. Porter discovered that in this era, thirty-three per cent of all Cabinet ministers were Catholic.[36] The percentage of Catholics on the Supreme Court at this time was 22.2%. Once again, it is clear that the federal cabinet is much more representative of the Canadian population than the Supreme Court. Furthermore, Porter found that there were no Jews appointed to the Cabinet at this time as was the case with the Supreme Court.

This lack of Jewish representation on our Court led us to a comparison with the results of the Schmidhauser study on the American Supreme Court. However, the limitations of such a comparison that were mentioned in the previous section should be recalled. The percentage of Catholics in the entire United States population is far smaller than in Canada. Therefore, it is not astonishing to see that Catholic representation on the Court is only six per cent.[37] It must be remembered that the Americans did not elect their only Catholic president until 1960, while Canada had a Catholic Prime Minister before the turn of the century. So the small figure of Catholics on the Court is not surprising. But since 1900 there have been four Jews appointed to the American Court.

Schmidhauser concludes that Roman Catholics and Jewish appointments have not been consciously initiated. There is no discernible policy as to the religious ratio on the Court. He shows this by describing the circumstances of the appointments of three of the Jewish members. Wilson appointed Brandeis and Roosevelt appointed Frankfurter strictly on ideological grounds rather than religious grounds. Hoover appointed Cardozo because of his outstanding qualifications and because of the pressure applied on the President from all corners of the country that such a man was "the logical successor to the justice who had resigned, Oliver Wendell Holmes."[38]

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[36] Porter, *op. cit.*, 389.

[37] Schmidhauser, *op. cit.*, 22.

[38] *Id.* 28.

Present customary practice in Canada dictates that the fraction of Catholics on the Court will be at least one third.[39] Today there are two French-Canadian Catholics on the Court (Fauteux and Pigeon) as well as at least one English-Canadian Catholic (Hall), representing that minority in English Canada. It is submitted that this number of Catholics on the Court will increase in the future because of the rising Catholic population in French Canada from natural increase and in English Canada from recent immigration. Finally it is hoped in the future that the non-Christian segment of our society will enjoy some representation on our Court as has not been the case in the past.

Political Party Affiliation

The matter that we are about to discuss is probably the most controversial variable which we have studied. This variable plus that of prior public office which will be discussed in the next section should reveal if the present appointment process is as partisan as many believe it to be. Many Canadians believe that appointments to the Supreme Court are "political gifts" given to old party faithfuls. Our results tend to substantiate this observation. Our study covers the whole lifetime of the Supreme Court, a period of 93 years. During this period, the Liberals were in power for 54 of those years. They appointed 34 judges. The Conservatives were in power for 39 years. They appointed 16 judges to the Supreme Court. It should be noted that we have insufficient data of party affiliation for 28% of the judges appointed. However, we feel that our results are nonetheless meaningful and significant.

In the first era 1875-96, the Liberals and Conservatives each appointed six judges. The results of the Liberal appointments are not too useful because there is insufficient data for 66% of the judges. However, of the Conservative appointees, 66% were Conservatives, while 16.5% were Liberal and 16.5% were of unknown party affiliation.

In the second era, 1896-1911, the Laurier years, party becomes a much more noticeable factor. Of the ten justices appointed by the Prime Minister, 80% were Liberals.

As we have seen, Mackenzie King held the power of appointment in both the third and fifth eras. In all, he appointed eleven justices to the Supreme Court. Of these, 72.7% were Liberal, 9.1% were Conservative and 18.2% were unknown.

We shall by-pass the fourth era because of insufficient data. However, the one judge for whom we had information was a Conservative, appointed by the Conservative Prime Minister Bennett. Mackenzie King shared the fifth era with St. Laurent, a Liberal. Prime Minister St. Laurent appointed two Liberals and one Conservative. We could find no relevant information on his other two appointments.

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[39] Russell, *op. cit.*, 193.

The final two eras clearly show that party is a major factor in appointments to the Supreme Court. Of Mr. Diefenbaker's appointments, 75% were Conservative and 25% were unknown. In his years in office, Mr. Pearson appointed two judges, both Liberals.

Of the fifty justices that we studied, the Liberals appointed thirty four. Of these appointments, 21 were Liberal, 4 were Conservative and we had insufficient data on the other 9 justices. The Conservatives appointed 16 justices in this period. Of these 9 were Conservative, 2 were Liberal and the party of the other 5 is unknown. These results indicate that a Canadian Government is unlikely to go outside its party in order to seek "appropriate" members for the Court.

TABLE VII

Period	1875-1896	1896-1911	1911-1930	1930-1935	1935-1957	1957-1963	1963-1968	Totals
Party of Appointees								
Liberals	2(16.8%)	8(80%)	5(62.5%)		6(60%)		2(100%)	23(46%)
Conservatives	5(41.6%)	1(10%)	1(12.5%)	1(25%)	2(20%)	3(75%)		13(26%)
Insufficient Data	5(41.6%)	1(10%)	2(25%)	3(75%)	2(20%)	1(25%)		14(28%)

The American experience is that party and ideology are the most important variables in appointments to the Supreme Court of the United States. Schmidhauser presents some correspondence of Teddy Roosevelt when he was considering appointing Oliver Wendell Holmes, a Republican, to the Court. He wrote:

> I should like to know that Justice Holmes was in entire sympathy with our views... before I would feel justified in appointing him. I should hold myself guilty of an irreparable wrong to the nation if I should put [upon the Court] any man who was not absolutely sane and sound on the great national policies for which we stand in public life.[40]

This conception of judicial recruitment seems necessitated by the important role that the American Supreme Court plays in the political process.

The obvious question now is whether *ideology* is as important in Canadian judicial appointments. We think not, primarily because there is little "real" ideological differences between the two Canadian parties which have appointed all our Supreme Court Justices. The major parties are brokers in public opinion whose basis for appeal is very broad. "The task of building a successful party [in Canada] is essentially that of building an uneasy coalition of sectional interests whose common body of doctrine is bound to be slight."[41]

Another factor which probably lessens the effect of ideology in judicial appointment is the role which the Canadian Supreme Court plays in the political process. The number of constitutional issues reaching our final court of appeal is a great deal fewer than in the United States, and hence, as was

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[40] Schmidhauser, *op. cit.*, 38.

[41] J. R. Mallory, *The Structure of Canadian Politics*, in PARTY POLITICS IN CANADA H. G. Thorburn, ed., (Toronto: Prentice Hall, 1963), 24.

mentioned in the *Introduction,* the effect of our Supreme Court in our political system is not as great as that in the U.S. Accordingly, it seems plausible that ideology, though an important factor, is not as significant in Canadian appointments to the Supreme Court.

Since, nonetheless, party affiliation is a major consideration in judicial recruitment, many groups in Canada are presently seeking reform in the appointment process. The mot persistent "reformer" is the Canadian Bar Association. This group of lawyers want a "say" in who is appointed to the Bench so that legal qualifications will override partisanship in judicial appointments. This reform would be very similar to the present American system in which the President submits a number of possible appointments to the American Bar Association for approval or advice before the name is submitted to the Senate.[42]

It seems that this method has already been initiated in Canada. In a recent article in the *Globe and Mail,*[43] the then Minister of Justice, Mr. Trudeau, stated that he submitted names to the Canadian Bar Association before anyone was appointed to the Bench. Whether this approach will be implemented in appointments to the Supreme Court remains to be seen.

Although party plays an important role in our appointment process, it is submitted that most of our Prime Ministers regretted this fact. This is exemplified in a speech given to the Canadian Bar Association by Prime Minister Bennett in 1930: "So long as I have power to influence it, the appointment of our judges will be made with regard only to the real qualifications for the exalted position they must occupy in the proper administration of our laws."[44] However, faced with the Canadian political facts of life, Prime Minister Bennett relented. In 1934, his secretary Andrew D. MacLean said that "in choosing men for appointment [Bennett] would like to make merit the chief consideration. Instead, he has found that party, race, religion, occupation and geographical location of the nominee are more important than his qualifications."[45]

We think it can be argued that in the Canadian political system, party affiliation is a major factor in appointments to the Supreme Court as it is in appointments to the Senate and the federal bureaucracy. Whether this has deleterious effects on the application of laws and the development of the Canadian legal systems, is for others to prove. Dean Lederman appears to be satisfied with the present appointment process because he feels that after the justice is appointed he rises above party lines to meet the challenge of such an important office and therefore ensures the independence of our judiciary.[46]

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[42] *See* Krislov, *op. cit.,* 19-22.

[43] September 5, 1967.

[44] Clark, *op. cit.,* 31.

[45] *Id.* 32.

[46] W. R. Lederman, THE COURTS AND THE CANADIAN CONSTITUTION, (The Carleton Library No. 16/McClelland and Stewart Ltd., 1964), 10.

Prior Office

Assuming, as we do, that Supreme Court appointment is part of the political process, it becomes important to analyse the prior involvement of the justices in political and public office. We will use the terms political office and public office to mean two different things. Political office refers to the position held by one elected by the people to represent their interests in government, or to an office to which one has been appointed by an elected government. Public office, on the other hand, incorporates political office but also refers to a position of responsibility and service not as intimately connected with the political process. An example of the latter would be the post of Bencher of a Law Society, or membership on the board of a hospital or foundation.

All members of the Supreme Court, must of course, be lawyers.[47] When this requirement is coupled with the fact that lawyers are the largest occupation group involved in government, one would expect most of the Supreme Court justices to have held prior political or public office. In the seventeenth Parliament, 33% of the members were lawyers; within the whole political system, Porter calculates that 64% of the political elite are lawyers.[48]

We found that 44 of the 50 justices in the court's history (88%) have held some form of prior public office. Political office was held by 28 of the 50, or 56%, predominantly as elected officials.

During the MacDonald era, of the 12 justices appointed, 8 had occupied prior public office; in every case the office was political as well. Mr. Justice Fournier was Minister of Justice in MacKenzie's government in 1874, before his appointment to the bench in 1875. Similiarly, Mr. Justice Sedgwick, appointed in 1893, had been Deputy Minister of Justice in 1888.

The Laurier period saw 10 justices appointed, 80% having held prior public office, and 70% having held political office. Three of the 7 holders of political office were cabinet ministers in the government which appointed them. Mr. Justice Davies, appointed in 1901, was Minister of Marine and Fisheries in the Laurier administration from 1896 to 1901. Mr. Justice Mills who joined the bench in 1902 was from 1896 to 1902 Minister of Justice. He was succeeded in that post by Mr. Justice Mills, who was then appointed to the court in 1906.

This trend continued in the Borden/Meighen period, 7 of the 8 justices appointed having been elected officials in either the federal or provincial houses. Mr. Justic Brodeur had a particularly illustrious prior political career; he was the Speaker of the House in 1901, Minister of Inland Revenue in 1904, and finally Minister of Marine and Fisheries in 1904 until 1911, when he was appointed to the court. He resigned from the bench to become Lieutenant Governor of Quebec in 1923. Mr. Justice Lamont was the first Attorney-General of Saskatchewan in 1905; he continued to be very active

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[47] Supreme Court Act, R.S.C. 1952, c.259 as amended by R.S.C. 1952, c.335 and S.C. 1956, c.48, s.5.

[48] Porter, *op. cit.*, 391.

in provincial politics until his appointment to the Supreme Court of Saskatchewan in 1918. His appointment to the Supreme Court of Canada came in 1927.

During the Bennett era, 1930-1935, four judges were appointed. Of these, only Mr. Justice Crocket had held political office, having been a Member of Parliament for York from 1904 to 1913. One other, Mr. Justice Hughes, held public office. He was a Bencher of the Law Society of Upper Canada in 1931 and a director of St. Michael's Hospital.

The correlation between appointments and political office continued to be low in the King/St. Laurent period. Only 5 of the 10 justices appointed had prior political office. However, we have classed Justices Kellock, Locke, Cartwright, and Fauteux as holding public office. Mr. Justice Cartwright, for instance, was a Bencher of the Law Society for Upper Canada for three years prior to his appointment in 1949 to the court.

Mr. Justice Hudson was involved for nine years in provincial and federal politics; Mr. Justice Estey was Minister of Education in his province from 1934 to 1941. Mr. Justice Abbott was a successful candidate for the House of Commons in the general elections of 1940, 1945, 1949, and 1953. In 1945 he was Minister of National Defence and in 1946 Minister of Finance.

In the Diefenbaker and Pearson periods the correlation between political office and appointment diminishes to zero. Prior public office was, however, common to most of the appointees. Mr. Justice Hall came as close as possible to political office having been an unsuccessful candidate for Parliament in 1948; he was also a campaign worker for Mr. Diefenbaker.

The fact that prior public office of some kind is common to nearly all of those appointed is neither surprising nor particularly illuminating. Those men of capability, responsibility and drive are more likely to be recognized by appointment to the nation's highest court, than are lawyers who have not become involved in society in some way.

Prior political office is more interesting. Seven cabinet minister have been appointed to the court. On the other hand, not one Member of the House was appointed directly to the court. Political office, of course, not only connotes a certain measure of competence and responsibility, but also involves such nebulous factors as political obligations and friendships.

TABLE VIII
PRIOR OFFICE

Era	Number of Justices	Prior public office	Prior political office	No public office	Insufficient Data
1875-1896	12(100%)	8(66%)	8(66%)	2(17%)	2(17%)
1896-1911	10(100%)	8(80%)	7(70%)	1(10%)	1(10%)
1911-1930	8(100%)	8(100%)	7(88%)		
1930-1935	4(100%)	4(100%)	1(25%)		
1935-1957	10(100%)	10(100%)	5(50%)		
1957-1963	4(100%)	4(100%)	0(00%)		
1963-1968	2(100%)	2(100%)	0(00%)		
Total	50(100%)	44(88%)	28(56%)	3(6%)	3(6%)

Prior Judicial Experience

Previous judicial experience would be expected to be an important factor in assessing the qualifications of nominees for appointment. Although there is no necessary connection between the way a judge acts on a lower court and his behaviour upon being promoted to a high appellate court, prior services does gives the recruiter a unique view of the ways in which a judge is likely to handle the new role. An incumbent judge is much more of a known quantity than a lawyer—no matter how famous—who has never actually conducted a trial or written an opinion. Furthermore, a judge with prior experience on a lower court is more likely to have accepted at least the major norms of the judicial role; where he has not, the evidence of his inability or refusal to accept such a role is clear and unmistakable.[49]

A lack of Supreme Court appointments with prior judicial experience might tend to support the belief that appointment to the Supreme Court represents the culmination of a successful political career, a compensation for unsuccessful political activity, or a reward for a life of public service.

However, the data generally supports the hypothesis that previous judicial experience is an important factor in selection. Twenty-seven of the 50 justices (or 54%) had such previous experience, while 23 (or 46%) had no such experience. It is interesting to note that of the 27 justices with prior judicial experience, 10, or 37%, had less than five years experience before their elevation to the Supreme Court; whereas, only 2 of the 27 justices (7%) had more than 20 years experience. Apprenticeship on the bench is apparently as likely to occur as not in the appointees background but where it existed, it was likely to be brief.

In the MacDonald era 8 of the 12 justices appointed had previous judicial experience, or 66%. One might suggest that because of the court's formation during this period, the percentage reflects a concern to appoint known judicial quantities, as no other period has such a high frequency from such a great population sample.[50] More than half of the eight justices were elevated from the Supreme Court of their respective provinces, and none of the justices had less than five years experience.

The Laurier period, 1896-1911, saw 10 justices appointed, 60% of them having had previous judicial experience with one-half having less than five years experience and the other half having more than 10 years experience.[51] Of the eight justices appointed during the Borden/Meighen era, 5 (or 63%) had prior judicial experience, while 3 of the 5 had less than five years. The Bennett period, 1930-35, continues this rather high frequency with 75% (the highest) of the 4 justices appointed having had previous judicial experience. However, 2 of the 3 justices with such experience had five years or less of it.

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[49] For U.S. data *see* Joel B. Grossman, LAWYERS AND JUDGES (New York: John Wiley & Sons, 1965), 202, Table 7.5.

[50] 1930-35 saw 75% of those appointed with judicial experience. However only three justices constitute the total appointee population for that period.

[51] Mr. Justice Nesbitt, appointed in 1903 by Laurier, had neither previous judicial experience nor was he a Liberal but rather a staunch Conservative.

The King/St. Laurent era is the only period where the frequency of prior judicial experience is less than 50%. This is so even though the total number of judicial appointments is quite high (ten).

Of the eight justices appointed during the King/St. Laurent period without judicial experience, five held some form of elected political office, while three, Justices Locke, Cartwright and Nolan had neither previous judicial experience nor political office.

The Diefenbaker and Pearson periods reflect the same lower frequency or prior judicial experience, (50%) and, similarly, one-half of the appointees in each period with such experience had less than five years on the bench.

Generally, prior judicial experience is in the form of a seat on the provincial court of appeal, with a few rare high court appointments.[52] We also noted that the longer one remains on the provincial appeal court bench, the smaller one's chances become for elevation to the Supreme Court of Canada.

TABLE IX

PRIOR JUDICIAL OFFICE

Era	1875-1896	1896-1911	1911-1930	1930-1935	1935-1957	1957-1963	1963-1968	Totals
Number of Justices Appointed:	12	10	8	4	10	4	2	50
Number with prior judicial experience:	8(66%)	6(60%)	5(63%)	3(75%)	2(20%)	2(50%)	1(50%)	27(54%)
Years of experience:								
0 - 5		3(30%)	3(37%)	2(50%)	1(10%)	1(25%)		10(20%)
5 - 10	3(25%)				1(10%)	1(25%)		5(10%)
10 - 15	3(25%)	1(10%)					1(50%)	5(10%)
15 - 20	1(8%)	1(10%)	2(25%)	1(25%)				5(10%)
20 +	1(8%)	1(10%)						2(4%)
Number with no prior experience:	4(33%)	4(40%)	3(37%)	1(25%)	8(80%)	2(50%)	1(50%)	23(46%)

Father's Occupation

Social class origins for the justices are difficult to establish with any precision, for we could obtain data on paternal occupation in only 60% of the cases.

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[52] Mrs. Justice Gwynne—sat on Common Pleas in 1868.
Mr. Justice Armour—C.J. of Ont. Ct. of Queen's Bench 1877.
Mr. Justice Killam—C.J. of Man. Ct. Queen's Bench 1885.
Mr. Justice Idington—High Court of Ontario, 1904.
Mr. Justice Anglin—High Court of Ontario 1904.

The following Table charts out the findings of our research:

TABLE X
FATHER'S OCCUPATION

Era	1875-1896	1896-1911	1911-1930	1930-1935	1935-1957	1957-1963	1963-1968	Totals
Clergyman:	3(25%)	2(20%)		1(25%)				6(12%)
Politician:	1(8%)	4(40%)	1(12%)	1(25%)	1(10%)			8(16%)
Lawyer:			1(12%)		2(20%)	1(25%)	1(50%)	5(10%)
Judge:			1(12%)		1(10%)			2(4%)
Doctor:			1(12%)		1(10%)			2(4%)
Landowner-Farmer:		2(20%)				1(25%)		3(6%)
Ship Capt.:				1(25%)				1(2%)
Shipbuilder:	1(8%)							
Druggist:					1(10%)			1(2%)
Merchant:	1(8%)							1(2%)
Architect:						1(25%)		1(2%)
Number of Justices Appointed:	12	10	8	4	10	4	2	
Insufficient data:	6(50%)	2(20%)	4(50%)	1(25%)	4(40%)	1(25%	1(50%)	19(40%)

The choice of the father's occupation as an index of social status is dictated by the difficulty in obtaining any other concrete data. Further, it is important to gain some idea of the background these men experienced in their earlier, formative years. Schmidhauser feels that "social transmission of attitudes beliefs, values and asperations has as its more effective vehicle the family."[53]

All of the justices, of course, underwent similar education, since all received legal training. This requirement makes its likely that only those from middle or upper status backgrounds could eventually have become candidates for appointment.

Many fathers of Supreme Court justices were distinguished public figures in their own right. For example, Mr. Justice Davies' father was the Colonial Secretary of Prince Edward Island; Mr. Justice Anglin's father was Warren Anglin, a great politician and a famous Speaker of the House of Commons. Only two justices for whom some data was available had fathers in the working class. Mr. Justice Rand came from such a humble background, his father never earning more than thirty-five dollars a week.

Conclusion

We have attempted to catalogue some of the factors which go to make up the Supreme Court justices' backgrounds. This was not accomplished with a desire to prove any particular hypothesis, but was done out of a

[53] Schmidhauser, *op. cit.*, 13.

belief that the particular social histories of our judges are relevant to a full understanding of their behaviour on the bench. To say that judges are human and carry attitudes and beliefs formed partly in the years prior to appointment, is not meant to impugn their integrity and objectivity of action upon the bench. We believe, however, that the law is not a purely positivist, logical exercise, but rather that it permits some freedom of judicial action, and therefore, is as susceptible to behaviourist study as other forms of human action. Out of such studies, we hope there may come a more complete knowledge of how our legal system functions.

THE SUPREME COURT OF CANADA

Chief Justices	*From*		*To*	
Hon. Sir William Buell Richards, Kt.	Oct. 8,	1875 —	Jan. 9,	1879
Hon. Sir William Johnston Ritchie, Kt.	Jan. 11,	1879 —	Sept 23,	1892
The Right Hon. Sir Samuel Henry Strong, P.C., Kt.	Dec. 13,	1892 —	Nov. 18,	1902
The Right Hon. Sir Henri Elzéar Taschereau, P.C. Kt.	Nov. 21,	1902 —	May 2,	1906
The Right Hon. Sir Charles FitzPatrick, P.C., G.C.M.G.	June 4,	1906 —	Oct. 21,	1918
The Right Hon Sir Louis Henry Davies, P.C., K.C.M.G.	Oct. 23,	1918 —	May 1,	1924
The Right Hon. Francis Alexander Anglin, P.C.	Sept. 16,	1924 —	Feb. 28,	1933
The Right Hon. Sir Lyman Poore Duff, P.C., G.C.M.G.	Mar. 17,	1933 —	Jan. 7,	1944
The Right Hon. Thibaudeau Rinfret, P.C.	Jan. 8,	1944 —	June 21,	1954
The Hon. Patrick Kerwin, P.C.	July 1,	1954 —	Feb. 2,	1963
The Hon. Robert Taschereau, P.C.	Apr. 22,	1963		
Puisne Judges				
Hon. William Johnston Ritchie	Oct. 8,	1875 —	Jan. 10,	1879
Hon. Samuel Henry Strong	Oct. 8,	1875 —	Dec. 12,	1892
Hon. Jean Thomas Taschereau	Oct. 8,	1875 —	Oct. 5,	1878
Hon. Télesphore Fournier	Oct. 8,	1875 —	Sept. 11,	1895
Hon. William Alexander Henry	Oct. 8,	1875 —	May 3,	1888
Hon. Sir. Henri Elzéar Taschereau	Oct. 7,	1878 —	Nov. 20,	1902
Hon. John Wellington Gwynne	Jan. 14,	1879 —	Jan. 7,	1902
Hon. Christopher Salmon Patterson	Oct. 27,	1888 —	July 24,	1893
Hon. Robert Sedgewick	Feb. 18,	1893 —	Aug. 4,	1906
Hon. George Edwin King	Sept. 21,	1893 —	May 8,	1901
Hon. Désiré Girouard	Sept. 28,	1895 —	Mar. 22,	1911
Hon. Sir Louis Henry Davies, K.C.M.G.	Sept. 25,	1901 —	Oct. 23,	1918
Hon. David Mills	Feb. 8,	1902 —	May 8,	1903
Hon. John Douglas Armour	Nov. 21,	1902 —	July 11,	1903
Hon. Wallace Nesbitt	May 16,	1903 —	Oct. 4,	1905
Hon. Albert Clements Killam	Aug. 8,	1903 —	Feb. 6,	1905
Hon. John Idington	Feb. 10,	1905 —	Mar. 31,	1927
Hon. James Maclennan	Oct. 5,	1905 —	Feb. 12,	1909
Hon. Lyman Poore Duff	Sept. 27,	1906 —	Mar. 16,	1933
Hon. Francis Alexander Anglin	Feb. 16,	1909 —	Sept. 15,	1924
Hon. Louis Philippe Brodeur	Aug. 11,	1911 —	Oct. 10,	1923
Hon. Pierre Basile Mignault	Oct. 25,	1918 —	Sept. 30,	1929
Hon. Arthur Cyrille Albert Malouin	Jan. 20,	1924 —	Oct. 1,	1924
Hon. Edmund Leslie Newcombe	Sept. 20,	1924 —	Dec. 9,	1931
Hon. Thibaudeau Rinfret	Oct. 1,	1924 —	Jan. 7,	1944

Hon. John Henderson Lamont	Apr.	2,	1927	—	Mar.	10, 1936
Hon. Robert Smith	May	18,	1927	—	Dec.	7, 1933
Hon. Lawrence Arthur Dumoulin Cannon	Jan.	14,	1930	—	Dec.	25, 1939
Hon. Oswald Smith Crocket	Sept.	21,	1932	—	Apr.	13, 1943
Hon. Frank Joseph Hughes	Mar.	17,	1933	—	Feb.	13, 1935
Hon. Henry Hague Davis	Jan.	31,	1935	—	June	30, 1944
Hon. Patrick Kerwin	July	20,	1935	—	July	1, 1954
Hon. Albert Blellock Hudson	Mar.	24,	1936	—	Jan.	6, 1947
Hon. Robert Taschereau	Feb.	9,	1940	—	Apr.	21, 1963
Hon. Ivan Cleveland Rand	Apr.	22,	1943	—	Apr.	27, 1959
Hon. Roy Lindsay Kellock	Oct.	3,	1944	—	Jan.	15, 1958
Hon. James Wilfred Estey	Oct.	6,	1944	—	Jan.	22, 1956
Hon. Charles Holland Locke	June	3,	1947	—	Sept.	16, 1962
Hon. John Robert Cartwright	Dec.	22,	1949	—		
Hon. Joseph Honoré Gérald Fauteux	Dec.	22,	1949	—		
Hon. Douglas Charles Abbott, P.C.	July	1,	1954	—		
Hon. Henry Gratton Nolan	Mar.	1,	1956	—	July	8, 1957
Hon. Ronald Martland	Jan.	15,	1958	—		
Hon. Wilfred Judson	Feb.	5,	1958	—		
Hon. Roland Almon Ritchie	May	5,	1959	—		
Hon. Emmett Matthew Hall	Nov.	23,	1962	—		
Hon. Wishart Flett Spence	May	30,	1963	—		
Hon. L. P. Pigeon			1967	—		