

# The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis

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# The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis

## **Abstract**

This study presents a descriptive statistical analysis of the Supreme Court of Canada's first one hundred Charter of Rights decisions (1982-1989). Charter appeals now constitute one-quarter of the Court's annual caseload. The Court has abandoned the judicial self-restraint that shaped its pre-Charter civil liberties jurisprudence. It has upheld rights claimants in 35 percent of its decisions and declared nineteen statutes void. Seventy-five percent of the Court's Charter work dealt with legal rights and criminal justice, but more provincial statutes were declared invalid than federal. After an initial period of consensus, the Court divided into identifiable voting blocs, with wide discrepancies between different Judges' support for Charter claims. In three respects—composition of docket, success rate, and nullification of statutes— the Canadian Supreme Court closely resembled its American counterpart.

## **Keywords**

Canada. Supreme Court--Statistics; Judicial statistics; Appellate courts--Statistics; Canada

# THE SUPREME COURT'S FIRST ONE HUNDRED CHARTER OF RIGHTS DECISIONS: A STATISTICAL ANALYSIS<sup>©</sup>

BY F.L. MORTON,\* PETER H. RUSSELL,\*\* AND MICHAEL J. WITHEY\*\*\*

This study presents a descriptive statistical analysis of the Supreme Court of Canada's first one hundred *Charter of Rights* decisions (1982-1989). *Charter* appeals now constitute one-quarter of the Court's annual caseload. The Court has abandoned the judicial self-restraint that shaped its pre-*Charter* civil liberties jurisprudence. It has upheld rights claimants in 35 percent of its decisions and declared nineteen statutes void. Seventy-five percent of the Court's *Charter* work dealt with legal rights and criminal justice, but more provincial statutes were declared invalid than federal. After an initial period of consensus, the Court divided into identifiable voting blocs, with wide discrepancies between different Judges' support for *Charter* claims. In three respects—composition of docket, success rate, and nullification of statutes—the Canadian Supreme Court closely resembled its American counterpart.

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## I. INTRODUCTION

On 16 April 1982, Canada formally amended its written Constitution by adding the *Charter of Rights and Freedoms*.<sup>1</sup> The *Charter* explicitly authorized judicial review and the power of all courts to declare offending statutes void. At the time, this constitutional transplant of American-style judicial review into the Canadian hybrid of British-style parliamentary democracy posed important questions of both theoretical and practical interest. Canada had already modified the Westminster model of parliamentary supremacy with an overlay of federalism and judicial review. However, the "exhaustion theory" held that both levels of government were supreme within their respective jurisdictions. The *Charter* appeared to challenge this supremacy and perhaps the structure of federalism itself. Suffice it to say that, in the intervening eight years, the *Charter*, or more precisely, the *Charter* through the courts, has had a broad, varied, and significant impact on the practice of politics in Canada.<sup>2</sup> In November 1989, the Supreme

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<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>2</sup> For article length discussions, see P.H. Russell, "Canada's *Charter*: A Political Report" (1984) Pub. Law 385 and F.L. Morton, "The Political Impact of the Canadian *Charter of Rights and Freedoms*" (1987) Can. J. Pol. Sci. 31. For book length treatments, see P. Monahan, *Politics and the*

Court of Canada handed down its one hundredth *Charter* decision.<sup>3</sup> This paper presents a statistical overview of these first one hundred *Charter* cases. It identifies trends with respect to both the *Charter's* impact on the Court and the impact of the Court's decisions on the *Charter*.

Statistical analyses of the Supreme Court's *Charter* decisions can provide an overall picture of the main patterns of a court's work and, in this way, provide a broader context for interpreting the significance of an individual case or the performance of an individual judge. Quantitative analyses can also increase our understanding of institutional features of a court's work, such as the distribution and sources of its case load and the relationships among its members. In sum, by identifying patterns not discernible through the study of leading *Charter* cases, quantitative analysis can generate empirically supported generalizations—that is, new understandings—of how the *Charter* is affecting the Supreme Court and how the Court is shaping the *Charter*.

This is not to deny the limitations of quantitative analysis of judicial decision making. It is not a substitute for jurisprudential analysis. For supreme courts—indeed, for all appellate courts in common law countries—the reasons given to justify a decision are often more important in the long run than a decision's basic outcome or "bottom line." In this respect, judicial decision making differs significantly from executive or legislative decision making. A single decision on a right or freedom can—because of the far reaching implications of its supporting reasons—outweigh in importance dozens of other decisions on the same right or freedom which go in the opposite direction. Statistical analyses treat all cases equally, when in fact they are clearly not all of equal significance. Similarly, statistical classifications of cases in terms of their bottom line outcomes—for example, upholding or denying a *Charter* claim—do not capture

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*Constitution: The Charter, Federalism and The Supreme Court of Canada* (Toronto: Carswell, 1987); M. Mandel, *The Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989); D.M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990); and R. Knopf & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992).

<sup>3</sup> It is not obvious what is and what is not a "*Charter* decision." Different rules for counting produce different results. For example, a recent study using different rules counted 121 *Charter* cases during approximately the same period as our study. See A. Heard, "The *Charter* in the Supreme Court of Canada: The Importance of Which Judges Hear an Appeal" (1991) 24 Can. J. Pol. Sci. 289. Our counting rules and the reasons behind them are set out in Appendix I, below at 49.

important jurisprudential subtleties. A decision that upholds a *Charter* claim might do so through opinions that actually narrow the meaning of the *Charter* right involved.

These limitations qualify, but do not negate, the value of a statistical approach to the Supreme Court's first one hundred *Charter* decisions. Statistical studies make a necessary contribution to the larger and more complex task of assessing the Supreme Court's *Charter* jurisprudence. Descriptive statistics provide a solid foundation, grounded in real facts, from which other studies can build, qualify, and elaborate. They also provide a healthy empirical check on what might otherwise be impressionistic generalizations about both the *Charter* and the Court. We present the following study in the spirit that animated Pritchett's landmark study of the American "Roosevelt Court":

What is obviously needed is a method in which the analysis is kept from shooting off into the void by being moored to a statistical and factual base, and in which fact-gathering is kept from becoming meaningless by being related to significant analysis.<sup>4</sup>

## II. THE *CHARTER'S* IMPACT ON THE COURT'S CASE LOAD

The *Charter* has changed the composition of the Supreme Court's case load. Table 1 shows that, since the Court's first *Charter* decision in May 1984, the volume of *Charter* cases has steadily increased. Since 1987, it has constituted nearly one-quarter of the Court's annual output of decided cases. Significantly, the corresponding percentage for the United States Supreme Court is almost identical. During the same time period, the American Court decided 169 *Bill of Rights*<sup>5</sup> decisions out of a total of 732 written decisions, or 23 percent.<sup>6</sup> This institutional parallel was unthinkable prior to the *Charter*.

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<sup>4</sup> C.H. Pritchett, *The Roosevelt Court: A Study in Judicial Politics and Values, 1937-1947* (New York: Octagon Books, 1963) at xv.

<sup>5</sup> U.S. CONST. amends. I-X [hereinafter *Bill of Rights*].

<sup>6</sup> Figures provided by H. Spaeth, Director, Supreme Court Data Base Project, Michigan State University.

TABLE 1

*Charter Decisions by All Supreme Court Decisions, 1981-1989*

	<i>All Decisions</i>	<i>Charter Decisions</i>	<i>Percent of Total</i>
1981	111	0	0%
1982	117	0	0%
1983	87	0	0%
1984	63	4	6%
1985	83	11	13%
1986	81	11	14%
1987	95	23	24%
1988	104	25	24%
1989	126	29 <sup>a</sup>	23%
Total	867 <sup>b</sup>	104 <sup>a</sup>	12%

a. Only Table 1 uses *Charter* decisions through the end of 1989 – 104 cases. The other tables are based on the first 100 decisions.

b. Data provided by Sylvie Roussel of Noël, Décary, Aubry Associates, *Supreme Court News* (Hull, Quebec).

This surge of *Charter* litigation contrasts sharply with the development of the 1960 *Canadian Bill of Rights*.<sup>7</sup> From 1960 to 1982, the Supreme Court decided only thirty-four *Canadian Bill of Rights* cases, an average of slightly over one per year. The high success of *Charter* claims in the Court's first two years of decision making, as shown in Table 2, seems to have stimulated use of the *Charter*. The Supreme Court sent a message to the legal profession and lower court judges that it was much more receptive towards rights claimants and an activist exercise of judicial review than it was under the 1960 *Canadian Bill of Rights*. Under the latter, the Supreme Court did not hand down a ruling that supported a rights claim until its 1969 *Drybones* decision,<sup>8</sup> and even this turned out to be the exception not the rule.

<sup>7</sup> R.S.C. 1985, App. III.

<sup>8</sup> *R. v. Drybones*, [1970] S.C.R. 282 [hereinafter *Drybones*].

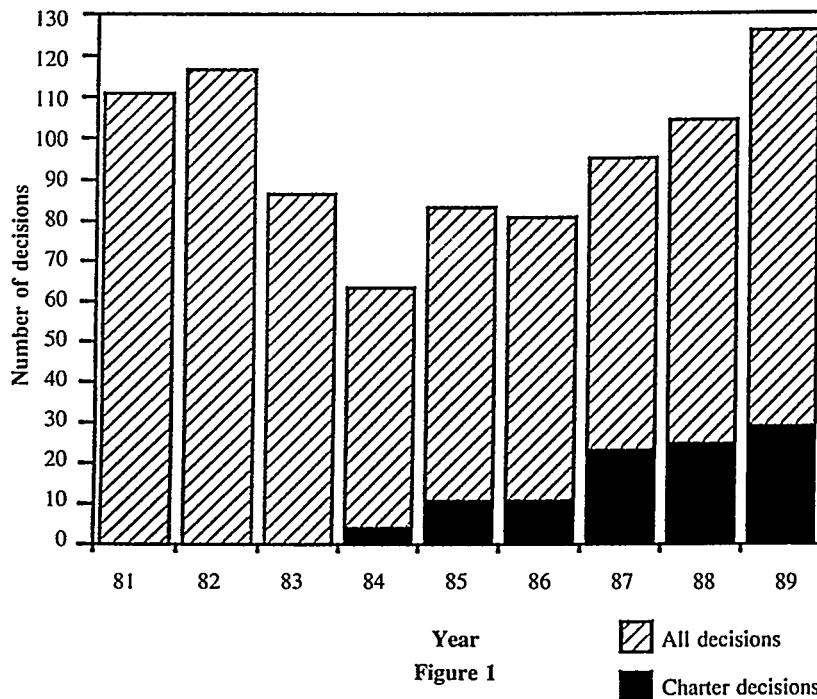
Supreme Court of Canada: *Charter* Decisions by All Decisions by Year

Figure 1

The total of 63 cases decided in 1984 represented the Court's lowest annual output since it took over as Canada's highest court in 1949. It was not until 1988 that the Court returned to the one hundred plus level which has been its norm since 1949. There has been disagreement over the cause of this decline. Russell has attributed it in part to the added complexity and burden of the *Charter* cases.<sup>9</sup> Monahan has disputed this explanation and has suggested that the Supreme Court's low productivity reflected changes in "the preferences and attitudes" of the Justices.<sup>10</sup> Both agreed that the poor health of several Justices—notably Chief Justice Laskin and Justice

<sup>9</sup> See P.H. Russell, "The First Three Years in Charterland" (1985) 28 Can. Pub. Ad. 367 at 371.

<sup>10</sup> Monahan, *supra*, note 2 at 26.



Chouinard—in the early 1980s contributed to the Court's loss of productivity.

More recent events lend credence to Russell's thesis of "information overload." In a 1987 interview, Justice Lamer declared that *Charter* cases were "especially gruelling" because of the difficulty of anticipating their longer term consequences. Lamer reiterated this view upon becoming the new Chief Justice in June 1990.<sup>11</sup> Upon his retirement in 1988, Justice Estey took issue with Lamer's assessment, but his other comments confirmed that he had become impatient with his colleagues' agonizing over *Charter* decisions.<sup>12</sup> Justice Le Dain's early retirement in 1987 was explained as a result of mental strain. During this same time period, the number of Court personnel doubled to 134 persons,<sup>13</sup> it abolished oral hearings for requests for leave to appeal, and twice lowered the maximum time allowed for oral argument on the merits—now only one hour per side. All these changes suggest an institution struggling to cope with its new workload.

The advent of the *Charter* has not meant an abatement of constitutional cases involving federalism. Indeed, the Supreme Court and lower courts still prefer, where possible, to settle a constitutional case on federalism grounds rather than the *Charter*.<sup>14</sup> During the period of the Court's first one hundred *Charter* cases, it also decided thirty-one federalism cases. This means that the Court's constitutional mandate is actually wider than that of the United States Supreme Court, which has virtually abandoned any active role as an umpire of federalism.<sup>15</sup>

With *Charter* litigation added to constitutional litigation based on the division of powers, the Supreme Court has become much more

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<sup>11</sup> K. Makin, "Lamer Picked to Head Supreme Court" *The [Toronto] Globe and Mail* (27 June 1990) A1.

<sup>12</sup> K. Makin, "Plain-talking Estey" *The [Toronto] Globe and Mail* (27 April 1988) A1.

<sup>13</sup> D. Vienneau, "Familiar Faces leave Supreme Court of Canada" (1990) 17:1 *The National* 14.

<sup>14</sup> For example, in *Westendorp v. R.*, [1983] 1 S.C.R. 43, the Supreme Court side-stepped a section 2(b) freedom of speech challenge to Calgary's anti-soliciting (prostitution) by-law by striking down the by-law as an invasion of the federal government's exclusive section 91 jurisdiction over criminal law.

<sup>15</sup> See *Garcia v. San Antonio*, 469 U.S. 528 (1985) discussed in R. Knopff & F.L. Morton, "Policing the Boundaries of Federalism: Judicial Review in a Comparative Perspective" (Paper presented at Adaptive Federalism: The United States and Canada Compared Conference, Nelson A. Rockefeller Center for the Social Sciences, Dartmouth College, 22-25 June 1989) [unpublished].

concerned with constitutional issues than was the case in the past. It would be a mistake, however, to regard the Canadian Supreme Court as simply a "constitutional court." Constitutional cases continue to account for only one-quarter to one-third of its decisions. This figure is only slightly lower than the comparable figure for the American Supreme Court for the same time period—44 percent.<sup>16</sup>

On the other hand, the *Charter* has contributed to the further decline of private law and a corresponding increase in public law cases. As Monahan correctly pointed out, the decline in private law cases decided by the Court dates back to 1974, when appeals as of right in private law cases were abolished. Prior to 1974, private law cases constituted approximately one-half of the cases decided by the Supreme Court each year. Since 1974, private law cases have steadily declined to the point where they now account for less than one-quarter.<sup>17</sup>

Monahan is thus correct in arguing that the decline of private law cases cannot simply be explained by the advent of the *Charter*.<sup>18</sup> However, his earlier conclusion, that *both* public and private law cases were declining in absolute numbers, must be revised in light of the more recent data. The Court's slow climb back to its old levels of productivity that began in 1985 corresponded with a doubling and then a redoubling of the number of *Charter* cases that it decided each year. Meanwhile, the number of civil law cases decided has remained stable at about 16 percent.<sup>19</sup> To conclude, while the *Charter* has not made the Supreme Court into an exclusively "constitutional court," it has contributed to the Court's transformation into a decidedly "public law" court.

### III. OUTCOME OF CASES

In the thirty-four *Canadian Bill of Rights* cases decided by the Supreme Court of Canada between 1960 and 1982, the rights claimant won only five times—a "success rate" of only 15 percent. Table 2 shows how markedly different the Supreme Court has treated rights claims

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<sup>16</sup> Out of a total of 732 written decisions, 324 were *Bill of Rights* cases. See Spaeth, *supra*, note 6.

<sup>17</sup> Monahan, *supra*, note 2 at 18. These are Monahan's figures through 1985.

<sup>18</sup> *Ibid.* at 22.

<sup>19</sup> See "Statistics" (1989) 5 Supreme Court News 24.

under the *Charter*. Thirty-five of the first one hundred *Charter* cases were won by the litigant. Once again, there is a strong parallel with American experience. During the same time frame, the non-government claimant won sixty-one of the 169 *Bill of Rights* decisions handed down by the American Supreme Court, a “success rate” of 36 percent!

TABLE 2

Outcome of the Supreme Court's First One Hundred *Charter* Decisions

	<i>Charter Claimant</i>		<i>Inconclusive</i>	<i>Total</i>
	<i>Losses</i>	<i>Wins</i>		
1984	1	3 (75%)	0	4
1985	3	7 (64%)	1	11
1986	8	3 (27%)	0	11
1987	16	6 (26%)	1	23
1988	17	8 (32%)	0	25
1989 <sup>a</sup>	16	8 (31%)	2	26
Total	61	35 (35%)	4	100

a. Through November 1989.

During its first two years of *Charter* decisions (1984 and 1985), the Court awarded victories to 67 percent (ten of fifteen) of the *Charter* claimants who came before it. The success rate of *Charter* claimants fell off steeply after this initial burst of judicial enthusiasm, averaging 27 percent to 32 percent over the last four years. During these six years, there has been a turnover of six Justices, and the Mulroney government has filled all six vacancies. Some commentators have attributed the sharp drop in *Charter* success rates to the change in the Court's personnel. David Beatty, for example, has described the six Mulroney appointees as “conservative judges . . . [who] are very deferential to the legislature [and] don't want to hold a law unconstitutional.”<sup>20</sup>

<sup>20</sup> The quotation is from G. Heaton, “Lest Ye Be Judged” (1990) 17:21 *Western Report* 36 at 36, which refers to Beatty, *supra*, note 2.

This analysis is only superficially persuasive. When the dramatic shift in outcomes first occurred in 1986, there had been only one change in the Court's personnel—La Forest replacing Ritchie. The next Mulroney appointment—L'Heureux-Dubé—had no discernable impact on the Court's *Charter* work until 1988, the third year of lower success rates. Furthermore, the decline in judicial activism after 1985 was common to all the Justices, not just the Mulroney appointees. For example, Dickson and Lamer, two of Beatty's "Trudeau liberals," had lower "pro-*Charter*" records than the Court average in 1989.<sup>21</sup> Finally, when we compare the record of the four Trudeau Justices who have left the court since 1988—Estey, Beetz, Le Dain, and McIntyre—with the four Mulroney replacements—Sopinka, Gonthier, Cory, and McLachlin—it is far from evident that the newcomers represent a distinctly more conservative approach to *Charter* issues. Indeed, McIntyre, a Trudeau appointee, emerged as the Court's most outspoken and consistent proponent of judicial self-restraint. Moreover, McIntyre's *Charter* performance is consistent with his voting record in federalism cases, which also discloses a commitment to judicial self-restraint and deference to elected lawmakers.<sup>22</sup> In sum, there is no consistent empirical support for Beatty's thesis that Prime Minister Mulroney has used his appointment power to shape an ideologically "conservative" or self-restrained Supreme Court.

A more probable explanation for the drop in the success rate of *Charter* claims after 1985 is a philosophical shift among some of the same Justices who began the Court's *Charter* interpretation in 1984. In retrospect, these first two years can be seen as a sort of *Charter* "honeymoon." Not only were many of these first fifteen decisions strongly activist, all but two were unanimous. The written judgments in these decisions manifested a very sanguine—some might say, naively optimistic—view of the Court's new role under the *Charter*. The Court seemed intent on minimizing any tension between its new mode of American-style judicial activism and its traditional, constitutional functions. The Judges seemed to be trying to convince their public—and

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<sup>21</sup> See below, Table 13 at 40.

<sup>22</sup> See G. Stevenson, "Federalism, Judicial Activism, and the Supreme Court of Canada since 1973" (Paper presented at Adaptive Federalism: The United States and Canada Compared Conference, Nelson A. Rockefeller Center for the Social Sciences, Dartmouth College, 22-25 June 1989) [unpublished].

perhaps themselves—that they were simply carrying out the legal implications of the *Charter*. The Court wanted to have its cake and eat it too, and for a brief moment, it did. Like all honeymoons, this one came to an end. As the Court ventured deeper into “Charterland,” it was no coincidence that the success rate for *Charter* cases began to fall precipitously, while at the same time, the number of dissenting opinions soared. The number of unanimously decided *Charter* decisions dropped from over 85 percent in 1984-85 to the 60 percent range since then.<sup>23</sup> The falling success rate and growing division on the Court both reflect the same hard reality: the inescapably contentious character of modern judicial review.

Success Rate and Unanimous Decisions in *Charter* Cases  
(Tables 2 and 11)

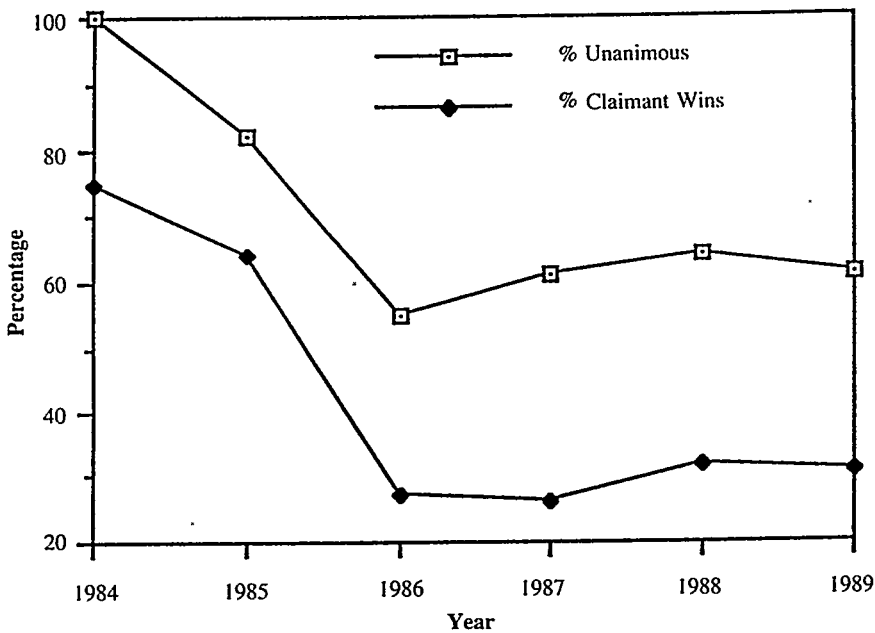


Figure 2

<sup>23</sup> See below, Table 11 at 37.

The seeds of this change were already present in the Court's 1984 and 1985 *Charter* decisions. Monahan noted that these early *Charter* decisions were characterized by two very different and conflicting tendencies.<sup>24</sup> On the one hand, the Court repeatedly invoked the rhetoric of judicial activism (especially Lord Sankey's "living tree" metaphor) and repeatedly ruled in favour of *Charter* claimants. At the same time, the Court drew a sharp distinction between law and politics, characterizing its new role under the *Charter* as purely legal.<sup>25</sup> Monahan argued that this somewhat schizophrenic behaviour was symptomatic of an underlying crisis in the Court over its new role under the *Charter* and "the relationship between law and politics."<sup>26</sup>

Gold noted that, under the veneer of unanimity in the Court's early *Charter* decisions, there were already doctrinal differences foreshadowing the later division of the Court. Gold suggested that these disagreements were more often expressed as concurring opinions rather than dissents because of "the Court's desire to establish the legitimacy of judicial review under the *Charter* and to satisfy its audiences that the *Charter* would not be interpreted as narrowly as had the *Canadian Bill of Rights*."<sup>27</sup> This tension was also evident in the Court's use—or misuse—of the "living tree doctrine" to justify its new *Charter* activism. As Gold observed, the Court's initial interpretations of the *Charter* were "as broad and liberal as could possibly be expected," an approach that it sought to justify by repeatedly

invoking the metaphor of the constitution as a living tree and dismissing concerns about the legitimacy of its expanded role ... No one could mistake the Court's message ... the *Charter* was to be liberally interpreted and enthusiastically applied.<sup>28</sup>

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<sup>24</sup> Monahan, *supra*, note 2 at c. 4.

<sup>25</sup> The most memorable example of this early attitude was Justice Wilson's curt assertion in *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 at 472 that "[t]he question before us is not whether the government's defense policy is sound but whether or not it violates the appellants' rights under section 7 of the *Charter*. This is a totally different question." Monahan caustically debunks this type of legalism, *supra*, note 2 at 62.

<sup>26</sup> Monahan, *supra*, note 2 at 56.

<sup>27</sup> M. Gold, "Of Rights and Roles: The Supreme Court and the *Charter*" (1989) 23 U.B.C. L. Rev. 507 at 530.

<sup>28</sup> M. Gold, "The Rhetoric of Rights: The Supreme Court and the *Charter*" (1987) 25 Osgoode Hall L.J. 375 at 410.

While the living tree doctrine originated in Lord Sankey's now famous *dicta* in the *Persons* case,<sup>29</sup> it developed primarily in the law of Canadian federalism. In this context, it came to be widely used, primarily by English Canadian jurists favouring a more centralist constitutional order,<sup>30</sup> to encourage judges to accommodate new policy initiatives of Canadian governments through a "flexible" interpretation of the federal division of powers effected by the *Constitution Act, 1867*.<sup>31</sup> Its practical effect was a form of judicial self-restraint that defers to majoritarian or democratic influences in Canadian government. By contrast, when the focus of the living tree doctrine is shifted from the law of federalism to the law of civil liberties, the roles of courts and legislatures are reversed. Rather than expanding legislative powers, the living tree doctrine expands limitations on legislative power. Rather than accommodating legislative problem solving, judges are encouraged to use the *Charter* to correct legislative errors. The continued use of the same legal metaphor of the living tree obscures the radical reevaluation that has occurred. While the original version of the living tree entails judicial self-restraint, the new version promotes judicial activism.<sup>32</sup>

While Monahan's characterization of the problem as a crisis may be overstated, there was clearly a tension between the Court's legalistic pretence and its activist behaviour. In 1986, this tension came to a head for at least some of the Justices, who adopted a more cautious or self-restrained approach to their *Charter* work.<sup>33</sup> This shift was particularly evident in the three cases decided early in 1986 rejecting language rights claims<sup>34</sup> and in the cases rejecting claims of organized labour decided later in 1986 and early 1987.<sup>35</sup>

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<sup>29</sup> *Edwards v. A.G. Canada*, [1930] A.C. 124 (P.C.) at 136.

<sup>30</sup> See A. Cairns, "The Judicial Committee and its Critics" (1971) 4 Can. J. Pol. Sci. 301 at 345.

<sup>31</sup> *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*).

<sup>32</sup> This is a summary of an argument developed in F.L. Morton & R. Knopff, "Permanence and Change in a Written Constitution: A Critical Analysis of the 'Living Tree' Doctrine and the *Charter of Rights*" (1990) 1 Sup. Ct L. Rev. (2d) 533 at 546.

<sup>33</sup> See Russell, *supra*, note 2.

<sup>34</sup> *Bilodeau v. A.G. Canada*, [1986] 1 S.C.R. 449; *MacDonald v. Montreal (City of)*, [1986] 1 S.C.R. 460; and *Société des Acadiens v. Association of Parents*, [1986] 1 S.C.R. 549.

<sup>35</sup> *R.W.D.S.U. v. Dolphin Delivery*, [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*]; *Reference Re Public Service Employees Relations Act*, [1987] 1 S.C.R. 313; *P.S.A.C. v. R.*, [1987] 1 S.C.R. 424; and *Saskatchewan v. R.W.D.S.U.*, [1987] 1 S.C.R. 460.

The growing sense of caution and judicial self-restraint can also be seen in the Court's handling of section 1 "reasonable limits" claims by the Crown. Section 1 involves what is widely recognized as a highly discretionary balancing test between the policy interests of the government and the interest of the claimant in having *Charter* rights upheld. From 1984 through 1987, the Court rejected all but one of the eleven section 1 defenses presented by the Crown. By contrast, in 1988 and 1989, it accepted eight of fourteen.<sup>36</sup> This data confirms what was already an open secret: the Court has become badly divided on how to handle the section 1 issue.

The simultaneous drop in the success rate and increase in dissenting opinions after 1985 cannot be explained as an effect of "conservative" Mulroney appointments to the Court. Rather, it represents a working out of the tension between the activist behaviour and the legalistic pretence in the Court's earlier decisions. There are real tensions between judicial review of constitutional rights and parliamentary democracy, and it was inevitable that these would surface and produce disagreement among the Justices. The same disagreements have fuelled constitutional debate in the United States for the past twenty years, and the advent of the *Charter* has brought "an American debate ... to Canada."<sup>37</sup> It has not, at least not yet, brought the corollary American practice of "court packing" into Canadian politics. The most that can be said at this point about the Mulroney Supreme Court appointments is that they have been chosen according to traditional, non-ideological criteria, and they have neither impeded nor hastened any prior trends in the Court's approach to *Charter* interpretation.

Even at the current lower levels of success, the *Charter* has served as a catalyst for a new era of judicial activism unparalleled in Canadian history and on a par with contemporary American practice. Evaluations of the Supreme Court's overall *Charter* performance tend to vary according to one's constitutional and judicial philosophy, as well as to one's approval or disapproval of the practical consequences of specific decisions. At an abstract level, there are those who believe that the *Charter* enshrines Canada's most important political truths and principles and therefore ought to be interpreted in the most generous manner. These "charterphiles" applaud the Court's initial activism and see the

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<sup>36</sup> See below, Table 9 at 35.

<sup>37</sup> Monahan, *supra*, note 2 at 29.



falling success rate as an unfortunate retreat. On the other hand, there are those who fear that the *Charter* will lead to government by lawsuit, a weakening of democratic institutions and habits, and an undue favouring of individual interests over the collective good. These *Charter* sceptics have welcomed the Court's second thoughts about its initial activism and instances of judicial self-restraint.

A final *caveat* is in order about the tendency of Beatty and others to use "liberal" and "conservative" as synonyms for "judicial activism" and "judicial self-restraint" when discussing the *Charter*. This usage is as misleading as it is common. It reflects a simplistic attitude of "the more rights, the better," an attitude that fails to grasp either the complexity or ambiguity of rights.<sup>38</sup> The wrong-headedness of this common practice can be illustrated by comparing judges with legislators. It is simply perverse to describe a politician who supports state intervention to regulate or redistribute private power as a liberal, and to simultaneously describe a judge who strikes down such laws as a liberal. Similarly, it is hardly clear why a politician who votes against interventionist, statist projects should be described as a conservative, while a self-restrained judge who votes to uphold the same laws is described as a conservative. Judicial activism and judicial self-restraint denote the willingness or reluctance of judges to use the power of judicial review to revise or obstruct the decisions of legislatures and the executive. They may be used with equal facility for either conservative or liberal ends. There is thus nothing to be gained and much to be lost by conflating the two sets of terms.

To conclude, these first one hundred decisions clearly indicate that the *Charter* has ushered in a new era of judicial activism unimagined in pre-*Charter* Canada. Whether the Court has exercised this new power for liberal or conservative ends tends to be area specific—for example, abortion, law enforcement, labour law, language policy, *etcetera*—and thus beyond the scope of this paper.

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<sup>38</sup> This problem is clearly explained by A. Petter & A.C. Hutchinson, "Rights in Conflict: The Dilemma of *Charter* Legitimacy" (1989) 23 U.B.C. L. Rev. 531 at 548.

## IV. TREATMENT OF COURTS OF APPEAL

With the exception of one reference by the federal government,<sup>39</sup> all of the Supreme Court's first one hundred *Charter* decisions have come on appeal from intermediary courts of appeal. This permits a comparison of the Supreme Court's decisions with those of the lower appeal courts in the same sets of cases. As indicated by Table 3, 68 percent—or about two of every three—of the *Charter* decisions appealed from the lower courts have been upheld by the Supreme Court. This figure contrasts sharply with the comparable American figure. In its 169 *Bill of Rights* decisions during this same time period, the American Supreme Court overturned 111 lower court decisions.<sup>40</sup> This contrast suggests that the American Court makes more strategic use of its discretion to choose which appeals to hear; that is, it selects cases that it initially intuitively as "mistakes" that should be given a hard second look. The American Court's more critical screening process may be explained by the much higher demand for its services—over 5,000 appeal requests annually. By comparison, the Canadian Supreme Court selects its 100 to 125 cases a year from only 400 appeal petitions.<sup>41</sup> It can thus afford to be more generous with its discretion to grant leave to appeal.

The 68 percent "upheld" figure for *Charter* decisions is marginally higher than the global average for all Supreme Court decisions during this same time period. Between 1982 and 1989, the Supreme Court heard 559 appeals and dismissed 59 percent of them.<sup>42</sup> This means that, for courts of appeal in general, the *Charter* is not posing any new or special problems in their relationship with the Supreme Court.

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<sup>39</sup> *Reference Re Manitoba Language Rights*, [1985] 2 S.C.R. 347.

<sup>40</sup> Spaeth, *supra*, note 6.

<sup>41</sup> See S.I. Bushnell, "Leave to Appeal Applications: The 1987-88 Term" (1989) 11 *Sup. Ct L. Rev.* 383 at 386. Bushnell's series of studies of how the Supreme Court exercises its discretionary control of its docket shows that the number of leave to appeal applications to the Supreme Court grew exponentially during the 1970s—from 150 to over 400—but levelled off and even fell during the 1980s.

<sup>42</sup> This data was provided upon the authors' request by P. McCormick, University of Lethbridge.

TABLE 3

The Supreme Court's Treatment of Courts of Appeals' *Charter* Decisions

	Number of <i>Charter</i> Decisions		Total	% Upheld
	Upheld	Reversed		
British Columbia <sup>a</sup>	17	2	19	89%
Alberta	9	4	13	69%
Saskatchewan	5	2	7	71%
Manitoba	4	2	6	67%
Ontario	25	6	31	81%
Quebec	7	11	19 <sup>b</sup>	37%
New Brunswick	1	1	2	50%
Nova Scotia	1	2	3	33%
Prince Edward Island	1	1	2	50%
Newfoundland	1	1	2	50%
Federal Court	3	2	5	60%
Total	74	34	109 <sup>c</sup>	68%

a. Includes one decision made by Yukon Court of Appeal.

b. Includes one case upheld in part, reversed in part.

c. Totals more than one hundred decisions because it includes ten additional Supreme Court *Charter* decisions which were not counted in this study due to the fact that they raised the same issues as cases that were already counted. Because they originated in different courts of appeal, however, they are included in Table 3. See Appendix 1 for coding rules. Total is 109, rather than 100, because one decision came as a reference directly from the federal government, with no lower court decision to review.

However, as Table 3 also shows, the reversal rates have varied quite widely for the different courts of appeal. The most remarkable difference is the very high reversal rate (63 percent) in appeals from Quebec. Only Nova Scotia has a reversal rate even close to Quebec's, but that is for only three cases. *Charter* ideology alone cannot account for the relative frequency with which the Supreme Court has reversed Quebec's Court of Appeal. The courts of appeal whose *Charter* decisions have been most frequently upheld by the Supreme Court—British Columbia, Ontario, and Saskatchewan—differ widely in their *Charter* profiles. British Columbia's Court of Appeal has been

fairly self-restrained, Saskatchewan's fairly activist, and Ontario's in the middle.<sup>43</sup> The *Charter* activism or self-restraint of an appeal court is thus not an accurate predictor of how its decisions will be reviewed by the Supreme Court.

Table 4 presents a closer look at those thirty-five Supreme Court *Charter* decisions that reversed lower court of appeal decisions. The number of reversals in favour of the *Charter* claimant (twenty-two) were twice as numerous as those favouring the Crown (eleven). Thus, when the Court did reverse lower court decisions, it was much more likely to do so in favour of the individual. This also means that for this set of one hundred cases, the Supreme Court supported the *Charter* claimant more frequently (35 per cent) than the appeal courts collectively (24 per cent).

TABLE 4

**Outcome of Supreme Court of Canada Decisions  
that Reversed Appeal Court Decisions**

<i>Source of Appeal</i>	<i>Charter Claimant</i>			<i>Total</i>
	<i>Wins</i>	<i>Losses</i>	<i>Inconclusive</i>	
British Columbia	2	0	0	2
Alberta	3	1	0	4
Saskatchewan	1	1	0	2
Manitoba	2	1	0	3
Ontario	3	2	1	6
Quebec	5	5	1	11
New Brunswick	1	0	0	1
Nova Scotia	2	0	0	2
Prince Edward Island	1	0	0	1
Newfoundland	1	0	0	1
Federal Court of Appeal	1	1	0	2
<b>Total</b>	<b>22</b>	<b>11</b>	<b>2</b>	<b>35</b>

<sup>43</sup> According to data generated by the *Charter* Database Project at the University of Calgary, the Crown has won 83 percent of the 168 reported *Charter* decisions in the B.C. Court of Appeal; 63 percent of the 85 decisions in the Saskatchewan Court of Appeal; and 73 percent of the 223 reported decisions in the Ontario Court of Appeal. The average for all courts of appeal is 76 percent. The figure for the Quebec Court of Appeal is 62 percent, but this is based on only 20 reported decisions, which we believe is considerably less than it should be.

As for the Quebec Court of Appeal, Table 4 reconfirms that *Charter* ideology cannot account for a court of appeal's fate before the Supreme Court. The latter's eleven reversals of Quebec decisions are evenly divided in favour of the Crown (five) and *Charter* claimants (five). This high reversal rate for its *Charter* decisions is consistent with Quebec's overall record on appeal in recent years, in which more than half of its decisions have been overturned on appeal by the Supreme Court of Canada—the third poorest record of all courts.<sup>44</sup>

The reasons for this are unclear, but may be linked to the civil law training and orientation of the judges on the Quebec Court of Appeal as opposed to the common law orientation of the majority of Supreme Court of Canada Justices. In their controversial decision in the *Daigle* abortion injunction case, for example, the majority of the Quebec Court gave a very literal reading to the term “human being” (*être humain*), a practice consistent with the civil law tradition of strict judicial fidelity to the letter of the law.<sup>45</sup> The Supreme Court of Canada reversed this decision and specifically rejected what it called a “dictionary” approach to legal interpretation.<sup>46</sup> Rather, the Supreme Court built their decision on a combination of precedents, legislative intent, and judicial notice, all of which are alien to the civil law tradition. The two conflicting *Daigle* decisions do suggest a clash between civil law and common law judicial norms. This clash may have contributed to the Quebec Court of Appeal's generally poorer record on appeals.<sup>47</sup>

The other remarkable fact about Quebec *Charter* appeals to the Supreme Court is how few of them there have been—barely half the number from Ontario, less than from British Columbia, and just a few more than from Alberta. This may reflect a more general tendency for Quebecers to view and to use the *Charter* less than citizens of other

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<sup>44</sup> According to data provided upon the authors' request by P. McCormick, University of Lethbridge, the Supreme Court upheld only 45 percent of all Quebec decisions that it reviewed on appeal between 1982 and 1989. The only appeal courts with worse records were New Brunswick (37 percent) and P.E.I. (33 percent; n=3).

<sup>45</sup> *Tremblay v. Daigle*, [1989] R.J.Q. 1735, 59 D.L.R. (4th) 609.

<sup>46</sup> *Daigle v. Tremblay*, [1989] 2 S.C.R. 530 [hereinafter *Daigle*].

<sup>47</sup> See P.H. Russell, *The Supreme Court as a Bilingual-Bicultural Institution* (Ottawa: Crown Printers, 1969) at 121 (Table IV.3).

provinces,<sup>48</sup> suggesting a cleavage between Francophone Quebec and the rest of Canada in attitudes toward the *Charter*—a tendency on which we will comment in more detail below.

## V. TREATMENT OF DIFFERENT *CHARTER* RIGHTS

Table 5 shows which *Charter* rights and freedoms have formed the basis of the Supreme Court's first one hundred decisions and how they were decided. We have classified each of the one hundred cases according to the right or freedom on which the case primarily turned and the outcome in terms of whether claimants achieved the practical objective of their litigation. In civil cases, a "win" means the *Charter* claimant received the remedy requested—the nullification of a statute or regulation, a declaratory judgment, an injunction, and so forth. In criminal cases also, a "win" means the Court awarded the *Charter* claimant/accused the remedy requested—the exclusion of evidence, the nullification of a statute, a reinstatement of a verdict of not guilty, an order for a new trial, and so forth. In cases where the *Charter* claimant received some, but not all of the remedies requested, the result of the case is coded as "inconclusive."

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<sup>48</sup> At present, this is only a hypothesis. The *Charter* Database Project currently lists only about 200 reported cases from Quebec, far fewer than any other major province. However, some preliminary consultations with Quebec law reports suggests that this represents a serious under-reporting of Quebec *Charter* cases in the English language law reports—perhaps by as many as 400 cases.

TABLE 5  
Different Categories of *Charter* Cases by Result

	Charter Claimant		Inconclusive	Total
	Wins	Losses		
Fundamental Freedoms	5	11	0	16
Democratic Rights	0	0	0	0
Mobility Rights	1	2	0	3
Legal Rights <sup>a</sup>	27	42	5	74
Equality Rights	1	4	0	5
Language and Education Rights <sup>b</sup>	4	3	0	7
Aboriginal Rights <sup>c</sup>	0	0	0	0
Total	38	62	5	105 <sup>d</sup>

a. Including s. 23(2).

b. Includes ss. 16-23 of the *Charter*, ss. 93 and 133 of the *Constitution Act, 1867*, s. 23 of the *Manitoba Act*, S.C. 1870, c. 3 and s. 16 of the *Saskatchewan Act*, S.C. 1905, c. 42.

c. Includes s. 25 of the *Charter* and s. 35 of the *Constitution Act, 1982*.

d. The following five cases are counted in two categories, thus making the total number of cases 105:

*R. v. Morgentaler*: Legal Rights and Fundamental Freedoms

*Black v. Law Society of Alberta*: Fundamental Freedoms and Mobility Rights

*Irwin Toy Ltd. v. A.G. Quebec*: Fundamental Freedoms and Legal Rights

*Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*: Fundamental Freedoms and Equality Rights

*Borowski v. A.G. Canada*: Legal Rights and Equality Rights

Table 5 clearly shows the extent to which legal rights cases have dominated the Court's *Charter* agenda—74 of its first one hundred decisions. This trend has been evident from early on. Most commentators agree that it favours both the Court and the *Charter*, as judicial expertise and authority are highest in this area. Also, legal rights cases arise predominantly in the making and enforcement of criminal law—a purely federal jurisdiction—and thus tend not to become

embroiled in the politics of federalism or language. This is not to minimize the importance or extent of the changes effected by the Court in this area. As Manfredi has shown, criminal process issues contain important substantive dimensions.<sup>49</sup> The Court has used the *Charter* to develop a new constitutional code of conduct for Canadian police officers in dealing with suspects and accused persons. In the process, it has pushed the Canadian criminal process away from the "crime control" toward the "due process" side of the ledger.<sup>50</sup> Ironically, while this policy area represents the Court's most extensive *de facto* efforts at law reform, it has thus far escaped public notice. American experience shows that this type of judicial policy making can become an issue of partisan political conflict. Beginning with Richard Nixon's 1968 presidential campaign, the Republican Party has criticized liberal judges for being "soft on criminals" and successfully exploited the "law and order" issue, particularly as it relates to the appointment of federal judges.<sup>51</sup> It will be of both theoretical and practical interest to see if a Canadian political party will try to make a political issue out of the Supreme Court's *Charter* inspired reform of the criminal law process.

Fundamental freedoms are a distant second, accounting for sixteen cases. The distinctively Canadian sections of the *Charter*—mobility rights and language rights—have generated only three and seven cases, respectively. On the other hand, they have been relatively more successful than the other sections. The two unsuccessful mobility rights cases dealt with the extradition of criminals<sup>52</sup> and the rights of non-citizens<sup>53</sup>—issues peripheral to the nation-building objectives of the

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<sup>49</sup> C. Manfredi, "Human Dignity and the Psychology of Interrogation in *Miranda v. Arizona*" (1986) 1 Can. J. L. & Soc. 109 at 124.

<sup>50</sup> The crime control perspective emphasizes the punishment of the guilty while the due process model emphasizes the protection of the innocent. These differences lead to equally different views of the relative value of legal rights. From the crime control perspective, the efficiency of the detection, conviction, and punishment of crime is the guiding principle. The due process model emphasizes procedural protection for the accused and considers efficiency of secondary importance. See H.L. Packer, "Two Models of the Criminal Process" (1964) 113 U. Pa. L. Rev. 10.

<sup>51</sup> See F.L. Morton, "Judicial Review and Conservatism in Canada and the United States" in B. Cooper, A. Kornberg & W. Mishler, eds, *The Resurgence of Conservatism in Anglo-American Democracies* (Durham, N.C.: Duke University Press, 1968) 163 at 184.

<sup>52</sup> *U.S.A. v. Cotroni*; *U.S.A. v. El Zein*, [1989] 1 S.C.R. 1469 [hereinafter *Cotroni*].

<sup>53</sup> *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.



primary author of section 6, Pierre Trudeau. By contrast, the one successful section 6 case struck down Alberta's restrictions on non-resident lawyers and law firms, precisely the type of interprovincial barrier targeted by Trudeau. Within months of the decision, almost every major law firm in Alberta had announced mergers or associations with large Toronto based firms.

Nor do the small number of language rights cases accurately reflect their considerable political impact. The Court's 1984 decision in *Quebec Protestant School Boards*<sup>54</sup> forced the Quebec government to realize that they had lost control of education and culture, and gave them the incentive to enter into new negotiations with Ottawa, which led eventually to the 1987 Meech Lake Accord. The Supreme Court's 1988 decisions dealing with language rights in Saskatchewan, Alberta, and Quebec,<sup>55</sup> and the political responses that they provoked, have in turn contributed heavily to the demise of Meech Lake. In both instances, the Supreme Court affirmed the existence of minority language rights, and, in both instances, the governments affected enacted new legislation negating the judicial rulings. Critics of Meech Lake seized upon Quebec's use of the section 33 override as an indicator of what to expect under the "distinct society" clause.

Section 15, the multi-pronged equality rights section, did not come into force until 1985. While it has flooded the lower courts with litigation,<sup>56</sup> it has not yet had much of an impact at the Supreme Court level. However, now that the Court has begun in *Andrews*<sup>57</sup> to lay the foundations of equality rights jurisprudence, a larger proportion of cases coming before the Court will likely deal with equality rights.

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<sup>54</sup> *A.G. Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66.

<sup>55</sup> *Mercure v. A.G. Saskatchewan*, [1988] 1 S.C.R. 234; *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712 [hereinafter *Ford*]; and *Devine v. A.G. Quebec*, [1988] 2 S.C.R. 790 [hereinafter *Devine*].

<sup>56</sup> See F.L. Morton & M.J. Withey, "Charting the Charter, 1982-1985: A Statistical Analysis" (1987) *Can. Hum. Rts. Y.B.* 65. See also G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).

<sup>57</sup> *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [hereinafter *Andrews*].

## VI. NULLIFICATION OF STATUTES

Section 32 of the *Charter* declares that its enumerated prohibitions apply to “all matters within the authority” of Parliament and the legislatures of each of the provinces. Cases such as *Dolphin Delivery*<sup>58</sup> and *Daigle*<sup>59</sup> show that occasionally it is difficult to say where “state action”—and thus the reach of the *Charter*—ends and “private action” begins. As a basic rule, however, *Charter* litigation can be directed at three forms of government actions: primary legislation or statutes; secondary legislation or administrative rules and regulations; and the conduct of government officials. Table 6 presents a breakdown of the Court’s first one hundred *Charter* decisions according to the “object” of the challenge.

TABLE 6

Object of *Charter* Challenge by Result of Case

	<i>Charter Claimant</i>		<i>Inconclusive</i>	<i>Total</i>
	<i>Wins</i>	<i>Losses</i>		
Statute	18	29	2	49
Conduct	18	32	1	51
Regulation	2	1	0	3
Total	38	62	3	103*

\*Total is greater than one hundred because some *Charter* cases involve challenges to both statute and conduct, or both statute and regulation, etc.

Executive conduct has been under review in just over 50 percent of the Court’s *Charter* cases. This is significantly lower than the proportion for *Charter* cases generally. Earlier studies by both Morton<sup>60</sup> and Monahan<sup>61</sup> found that two out of every three *Charter* cases are challenges to conduct, usually the actions of the police in the

<sup>58</sup> *Supra*, note 35.

<sup>59</sup> *Supra*, note 46.

<sup>60</sup> Morton & Withey, *supra*, note 56 at 72.

<sup>61</sup> Monahan, *supra*, note 2 at 38.

enforcement of criminal law. The Supreme Court, it appears, has been more willing to grant leave to appeal when statutes are challenged than when conduct is challenged.

This has implications for the new role of the Court under the *Charter*. If the Supreme Court followed the trend of the lower courts and primarily heard conduct cases, it would reduce the potential for direct clashes between the Court and legislatures over the substantive policy choices implicit in most *Charter* challenges to statutes. It would also weaken the anti-democratic critique of judicial review. The Court's decision to hear a roughly equal number of statute and conduct cases has thrust it into a more competitive relationship with Parliament and provincial legislatures, and made the legitimacy issue more explicit and thus more difficult to ignore.<sup>62</sup> This may have been a contributing factor to the end of the Court's initial *Charter* honeymoon described above. The legitimacy issue becomes even sharper when we focus on the judicial nullification of statutes, the subject of Table 7.

TABLE 7

## Nullification of Federal and Provincial Statutes

	<i>Upheld</i>	<i>Nullified</i>	<i>Total</i>
Statute			
Federal	16	8	24
Provincial	15	11	26
Total	31	19	50

Table 7 shows that in the seven years since its adoption, the Supreme Court has used the *Charter* to strike down a total of nineteen statutes in whole or in part. Remarkably, this figure is almost identical with the number of statutes declared invalid by the U.S. Supreme Court for *Bill of Rights* violations during the same time period—twenty.<sup>63</sup>

The nineteen *Charter* nullifications also contrast sharply with the Court's deferential, British-style exercise of judicial review under the

<sup>62</sup> The "legitimacy issue" is discussed at length by Monahan, *ibid.* at c. 3.

<sup>63</sup> Spaeth, *supra*, note 6.

1960 *Canadian Bill of Rights*. Under the latter, the Court struck down only one statute in twenty-two years—a section of the *Indian Act*<sup>64</sup> which restricted drinking rights on reserves.<sup>65</sup> The magnitude of this change can be appreciated by comparing this figure to the number of statutes declared *ultra vires* on federalism grounds during the same time frame, only ten in thirty-one cases.<sup>66</sup> The *Charter* has clearly replaced federalism as the primary basis for the Court's exercise of judicial review.

More provincial legislation (eleven statutes) has been declared invalid under the *Charter* than federal (eight statutes). This is consistent with Morton's earlier study of all appeal court nullifications under the *Charter*, which found that the quantitative impact of the *Charter* on federal and provincial statutes was roughly equal, but that there were some interesting qualitative differences.<sup>67</sup> The invalidated provincial statutes tended to be of a substantive character and more recently enacted. The same trend is present in the federal and provincial statutes declared invalid by the Supreme Court, which are presented in Table 8.

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<sup>64</sup> R.S.C. 1952, c. 149, s. 94(b).

<sup>65</sup> See *Drybones*, *supra*, note 8.

<sup>66</sup> The ten cases involve declarations of *ultra vires* or inapplicability: *Re Upper Churchill Water Rights Revision Act*, [1984] 1 S.C.R. 297; *Goldwax v. Montreal (City of)*, [1984] 1 S.C.R. 525; *Deloitte, Haskins & Sells v. Workers' Compensation Board*, [1985] 1 S.C.R. 785; *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285; *Paul v. Paul*, [1986] 1 S.C.R. 306; *Scowby v. Glendenning*, [1986] 2 S.C.R. 227; *Bell Canada v. Quebec*, [1988] 1 S.C.R. 740; *Canadian National Railway Co. v. Courtois*, [1988] 1 S.C.R. 869; *Alltrans Express Ltd v. British Columbia (Workers' Compensation Board)*, [1988] 1 S.C.R. 97; and *Clark v. Canadian National Railway Co.*, [1988] 2 S.C.R. 680.

<sup>67</sup> F.L. Morton *et al.*, "Judicial Nullification of Statutes under the *Charter of Rights and Freedoms*, 1982-1988" (1990) 28 *Alta. L. Rev.* 396 at 426.

**TABLE 8**  
**Statutes Nullified by the Supreme Court of Canada under the Charter**

Statute	Subject Matter	Date of Enactment	Charter Section	Substantial Procedure	Case Name
<b>Federal</b>					
<i>Narcotic Control Act</i> <sup>1</sup>	Reverse Onus	1961	s. 11(d)	Procedure	<i>R. v. Oakes</i>
<i>Narcotic Control Act</i> <sup>2</sup>	Warrantless Search	1961	s. 8	Procedure	<i>R. v. Hamill</i>
<i>Narcotic Control Act</i> <sup>3</sup>	Minimum Sentence	1961	s. 12	Procedure	<i>R. v. Smith</i>
<i>Criminal Code</i> <sup>4</sup>	Constructive Murder	1892	s. 7 & s. 11(d)	Procedure*	<i>R. v. Vaillancourt</i>
<i>Criminal Code</i> <sup>5</sup>	Abortion	1969	s. 7 & s. 2(a)	Procedure & Substance	<i>R. v. Morgentaler</i>
<i>Combines Investigation Act</i> <sup>6</sup>	Search and Seizure	1952	s. 8	Procedure	<i>Hunter v. Southam Inc.</i>
<i>Immigration Act</i> <sup>7</sup>	Fair Hearing for Refugees	1976	s. 7	Procedure	<i>Singh v. Minister of Employment and Immigration</i>
<i>Lord's Day Act</i> <sup>8</sup>	Sunday Closing	1906	s. 2(a)	Substance	<i>R. v. Big M. Drug Mart Ltd.</i>
<b>Provincial</b>					
<i>An Act Respecting Municipal Taxation and Providing Amendments to Certain Legislation</i> <sup>9</sup>	School Taxation	1979	s. 93 BVA	Substance	<i>A.G. Quebec v. Greater Hull School Board</i>
<i>Charter of the French Language</i> <sup>10</sup>	Minority Language Education Rights	1977	s. 23	Substance	<i>A.G. Quebec v. Quebec Association of Protestant School Boards</i>
<i>Summary Convictions Act</i> <sup>11</sup>	Appeal Procedure	1977	s. 11(h)	Procedure	<i>Corporation Professionnelle des Medecins du Québec v. Thibault</i>
<i>Charter of the French Language</i> <sup>12</sup>	Language of Advertising: French-only Signs	1977	s. 2(b)	Substance	<i>Ford v. A.G. Quebec</i>

\*Section 213(d) could be interpreted as either substantive or procedural. We have chosen to treat it as procedural because of the reduced burden of proof placed on the Crown.

<sup>1</sup>R.S.C. 1970, c. N-1, s. 8

<sup>2</sup>R.S.C. 1970, c. N-1, s. 10(1)(a)

<sup>3</sup>R.S.C. 1970, c. N-1, s. 5(2)

<sup>4</sup>R.S.C. 1970, c. C-34, as am. S.C. 1974-75, c. 93, s. 13; c. 105, s. 29, item 1(4), s. 213(d)

<sup>5</sup>R.S.C. 1970, c. C-34, s. 251

<sup>6</sup>R.S.C. 1970, c. C-23, ss. 10(1) and (3)

<sup>7</sup>1976, S.C. 1976-77, c. 52

<sup>8</sup>R.S.C. 1970, c. L-13

<sup>9</sup>S.Q. 1979, c. 72

<sup>10</sup>R.S.Q. 1977, c. C-11, c. VIII

<sup>11</sup>R.S.Q. 1977, c. P-15, s. 75

<sup>12</sup>R.S.Q. 1977, c. C-11, ss. 58 and 69

TABLE 8 (CONTINUED)  
 Statutes Nullified by the Supreme Court of Canada under the Charter

Statute	Subject Matter	Date of Enactment	Charter Section	Substance/Procedure	Case Name
<i>Charter of the French Language</i> <sup>13</sup> <i>Regulation Respecting the Language of Commerce and Business</i> <sup>14</sup> <i>Motor Vehicle Act</i> <sup>15</sup>	French as Language of Business Absolute Liability	1977	s. 2(b)	Substance	<i>Devine v. A.G. Quebec</i>
<i>Barristers and Solicitors Act</i> <sup>16</sup> <i>Rules of the Law Society of Alberta</i> <sup>17</sup>	Citizenship Requirement Interprovincial Law Firms	1981	s. 7	Procedure	<i>Reference Re s. 94(2) of the Motor Vehicle Act (B.C.)</i> <i>Andrews v. Law Society of British Columbia</i> <i>Black v. Law Society of Alberta</i>
<i>The Summary Offences Procedure Act</i> <sup>18</sup> <i>Act Respecting the Operation of Section 23 of the Manitoba Act in regard to Statutes</i> <sup>19</sup>	Language Rights: Summons Issued in English Only Official Languages in Manitoba	1979 1983	s. 15(1) s. 6(2)(b) s. 2(d)	Substance Substance	<i>R. v. Mercure</i> <i>Reference Re Manitoba Language Rights</i>
<i>Summary Convictions Act</i> <sup>20</sup> <i>Highway Traffic Act</i> <sup>21</sup>	Language *	1978 1980 (amend. 1982) 1970	s. 16 of Sask. Act s. 133 of constitution s. 23 of Man. Act s. 23 of Man. Act	Substance Substance Substance	<i>Bilodeau v. A.G. Manitoba</i>
		18R.S.S. 1978, c. S-63 191980 (Man.), c. 3 (C.C.S.M., c. S207), ss. 1,2,3,4 (am. 1982, c. 3, s. 1); 5,6,7,8 20R.S.M. 1970, c. S-230 21R.S.M. 1970, c. H-60			

\*See *Reference Re Manitoba Language Rights*

<sup>13</sup>R.S.Q. 1977, c. C-11, ss. 59-61  
<sup>14</sup>R.R.Q. 1981, c. C-11, r. 9, ss. 8,9, 12-19  
<sup>15</sup>R.S.B.C. 1979, c. 288, s. 94, as am. *Motor Vehicle Amendment Act, 1982*, S.B.C. 1982, c. 36, s. 19  
<sup>16</sup>R.S.B.C. 1979, c. 26, s. 42  
<sup>17</sup>Rules 75B, 154; *Legal Profession Act*, R.S.A. 1980, c. L-9

Seven of the eight nullifications of federal statutes were procedural in character and half were based on the legal rights provisions of the *Charter*. By contrast, nine of the eleven nullifications of provincial statutes were substantive in character, and seven of them were based directly or indirectly on French/English minority language and education issues, a perennial source of conflict in Canadian politics.<sup>68</sup>

Table 8 shows that five of the eight invalidated federal statutes involved criminal law. Parliament's exclusive power over criminal law makes federal legislation in Canada a prime target for *Charter* challenges. This contrasts with the United States, where the states have the primary responsibility for making criminal law. As a result, the American Supreme Court's application of the *Bill of Rights*, via the Fourteenth Amendment,<sup>69</sup> applies primarily to the states. As noted above, most of the federal legislation overturned by the Court on *Charter* grounds has involved procedural issues rather than policy concerns.

The major exceptions, and they are major, were the *Singh*<sup>70</sup> and *Morgentaler*<sup>71</sup> decisions. The latter is the most famous—or infamous—*Charter* decision to date. *Morgentaler* overturned the abortion provisions of the *Criminal Code*<sup>72</sup> and forced the Mulroney government to deal with the politically charged abortion issue. The government struggled for more than two years to frame a new abortion policy. In May 1990, after several failed attempts, the House of Commons in a free vote adopted *Bill C-43*,<sup>73</sup> a compromise measure that left abortion in the *Criminal Code*, but allowed therapeutic abortions when a pregnancy threatened the life or health of the mother. *Bill C-43* abolished the old requirement of committee approvals and left the determination of the threat to health to a woman and her doctor. In this respect, it closely

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<sup>68</sup> The 1988 French-only public signs cases were decided on section 2(b) "freedom of expression" grounds, but the freedom involved was the freedom to advertise and do business in English. See *Ford* and *Devine*, *supra*, note 55.

<sup>69</sup> U.S. CONST. amend. XIV.

<sup>70</sup> *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

<sup>71</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

<sup>72</sup> *Criminal Code*, R.S.C. 1970, c. C-34, s. 251.

<sup>73</sup> *Bill C-43, An Act Respecting Abortion*, 2d Sess., 34th Parl., 1989-90-91 (rejected 31 January 1991).

followed Chief Justice Dickson's judgment in the *Morgentaler* decision.<sup>74</sup> In January 1991, however, an evenly divided Senate defeated *Bill C-43*.<sup>75</sup> The government promptly announced that it would not introduce new legislation. The legal vacuum created by the government's inaction has led to a variety of different provincial responses to the funding and access issues, and also to a series of abortion injunction cases. The most dramatic, *Daigle*,<sup>76</sup> went all the way to the Supreme Court for an unprecedented emergency hearing during the summer recess of 1989.

The *Singh* decision is less well known, but hardly less dramatic in its effects. *Singh* struck down the procedures for hearing applications for refugee status under the *Immigration Act*<sup>77</sup> and forced the government to provide a mandatory oral hearing for refugee applicants. This decision has had the unintended consequences of creating a backlog of 124,000 refugee claimants, an amnesty for 15,000 claimants already in Canada, \$179 million in additional costs, and a new refugee law that some critics say is more unfair than the original one.<sup>78</sup> The new refugee law took effect 1 January 1989. Eighteen months later, the government announced that the new Immigration and Refugee Board would quadruple its capacity to keep up with applications. This would allow the Board to hire an additional 280 public servants (to add to the present 496) at an additional cost of \$20 million. This increase brings the annual budget of the new Board to \$80 million.<sup>79</sup>

Only five provinces have lost legislation to *Charter* challenges: Quebec, British Columbia, Alberta, Saskatchewan, and Manitoba. Of the five, Quebec has clearly been most affected. Not only has it had the highest number of nullifications (five), but the statutes affected represented recent policy initiatives that were important to the Quebec government—all but one in the fields of language and education. By

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<sup>74</sup> See F.L. Morton, "The Meaning of *Morgentaler*: A Political Analysis" in I. Gentles, ed., *A Time to Choose Life: Women, Abortion, and Human Rights* (Toronto: Stoddart Publishing, 1990) 168.

<sup>75</sup> The vote on third reading was 43-43. Under Senate rules, a tie vote defeats the legislation.

<sup>76</sup> *Supra*, note 46.

<sup>77</sup> *Immigration Act, 1976*, S.C. 1976-77, c. 52, ss 2, 3(g), 4, 5, 23, 27, 32, 37, 45-48, 55, and 70-72.

<sup>78</sup> See Mandel, *supra*, note 2 at 172-73 and F.L. Morton, "The Public Cost of *Charter* Decisions" *The Financial Post* (30 January 1990) 14.

<sup>79</sup> V. Malarek, "Refugee Processing Expected to Improve" *The [Toronto] Globe and Mail* (23 June 1990) A3.



contrast, none of the other provincial legislation overturned represented recent policy commitments considered important by the provincial governments. For Quebec, the Court's decisions striking down various sections of *Bill 101*<sup>80</sup> were serious policy defeats.<sup>81</sup>

In one sense, Quebec presents the clearest example of the counter-majoritarian character of judicial review, where the Court uses the *Charter* to protect the rights of a local minority against the local majority. From a different perspective, however, the same decisions, particularly in conjunction with the language rights cases from Manitoba and Saskatchewan, show how the *Charter*, through the Supreme Court, can serve as a vehicle for majoritarian democracy rather than a limitation on it. The American comparison is instructive on this point. In the United States, seven times more state laws (970) have been declared unconstitutional than federal laws (135).<sup>82</sup> In the same time period as our study (1984-89), eighteen state statutes and only two federal statutes were declared invalid for violating the *Bill of Rights*.<sup>83</sup>

Leading American commentators argue that, rather than being a restraint on Congress and the president, the American Supreme Court has more often been "an active participant in the ruling national coalitions that dominate American politics,"<sup>84</sup> especially when it comes to curbing state or local policies that are offensive to the ruling national coalition. The U.S. Supreme Court's lead in attacking racial segregation in the South is only the most well known example of the use of judicial review to restrain "aberrant" behaviour of regional majorities. The Canadian Supreme Court's activist promotion of national bilingualism at the expense of the preferred unilingual policies of some provincial governments also supports Shapiro's broader comparative thesis that the primary function of judicial review is not legal but political—to assist

<sup>80</sup> *Charter of the French Language*, R.S.Q. 1977, c. C-11 [hereinafter *Bill 101*].

<sup>81</sup> There is yet another ironic American parallel here. The state that has had the most statutes declared invalid by the American Supreme Court is Louisiana, a state whose original settlers came from French Canada, and still the only civil law state in the U.S. See H.J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France* (New York: Oxford University Press, 1986) at 293.

<sup>82</sup> *Ibid.* The figures are current through the summer of 1985.

<sup>83</sup> Spaeth, *supra*, note 6. Of the 18 state statutes, four were municipal ordinances.

<sup>84</sup> See R.A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker" (1957) 6 J. Pub. L. 279 at 295.

central authorities to overrule local norms and to impose national policies in their place.<sup>85</sup>

The greater impact of the *Charter* on provincial law making also supports earlier predictions about the potential of the *Charter* to act as a force for policy uniformity throughout Canada.<sup>86</sup> Whether this will serve a nation-building function, as its proponents hoped, or be a politically divisive influence, remains to be seen. Judicially mandated policies pleasing to the central authorities often do not sit well with local governments. Within Quebec, for example, the Supreme Court's decision in the "French-only" public signs cases<sup>87</sup> triggered a significant increase in support for *Bill 101* and restrictions on English language signs. Support for the separatist *Parti Québécois* jumped 8 percent, while support for bilingualism was cut in half.<sup>88</sup> Outside of Quebec, Premier Bourassa's use of the section 33 override to reinstate restrictions on English language advertising was widely criticized and contributed to the eventual defeat of the Meech Lake Accord. Critics of the Accord effectively argued that the distinct society clause would be used to insulate Quebec's attempts to promote French and suppress English from successful *Charter* challenges.

The bitter debate over the distinct society clause reflects the *Charter's* disproportionate impact on Quebec. Research conducted in 1987 showed that while the *Charter* was as popular in Quebec as in the rest of Canada among those who knew about it, considerably fewer people knew about the *Charter* in Quebec than elsewhere in the country.<sup>89</sup> The introduction of the *Charter* without the Quebec

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<sup>85</sup> M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981) at 24.

<sup>86</sup> See P.H. Russell, "The Political Purposes of the Canadian *Charter of Rights and Freedoms*" (1983) 61 *Can. Bar Rev.* 31. Also see R. Knopff & F.L. Morton, "Nation-Building and the *Charter of Rights and Freedoms*" in A. Cairns & C. Williams, eds, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 133 at 183.

<sup>87</sup> See *Ford and Devine, supra*, note 55.

<sup>88</sup> J.H. Guy, R. Nadeau & E. Cloutier, "La crise linguistique au Québec: une étude du mouvement de l'opinion publique engendré par le jugement de la Cour suprême sur l'affichage commercial" (Paper presented at the annual meeting of the Canadian Political Science Association, Victoria, B.C., May 1990) [unpublished].

<sup>89</sup> See P. Sniderman *et al.*, "Political Culture and the Problem of Double Standards: Mass and Elite Attitudes Toward Language Rights in the Canadian Charter of Rights and Freedoms" (1989) 22 *Can. J. Pol. Sci.* 259 at 284.

government's consent and subsequent developments in judicial and constitutional politics may make the *Charter* less attractive to Francophone Quebecers. The Supreme Court's decisions overturning key elements of Quebec's *Bill 101* and the hostility directed against Quebec for using the override clause to protect *Bill 178*<sup>90</sup> from *Charter* challenge may contribute to a political environment in which the *Charter* is increasingly seen by the *Québécois* as a constitutional instrument hostile to their primary constitutional concerns.

## VII. JUDICIAL DISCRETION: REASONABLE LIMITATIONS AND THE EXCLUSION OF EVIDENCE

Frequently in *Charter* cases, after the Court has found that a right has been violated, it goes on to a second stage of analysis to consider whether the law abridging the right is a "reasonable limit" under section 1 or whether, if it is a criminal case, the evidence should be excluded under section 24(2). Both these types of second stage determinations are crucial to the practical outcome of *Charter* cases. They are also both highly discretionary, and thus reliable indicators of judicial self-restraint or activism. Tables 9 and 10 present data on the outcome of these second stage determinations in Supreme Court decision making. The most significant feature of both tables is the contrast in outcomes between the early years and more recent years, evidence which further supports the thesis that after an initial burst of activism, the Court has moved toward a practice of greater self-restraint.

Section 1 states that the rights and freedoms enumerated in the *Charter* are "subject to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society." Rather than treat this as a self-evident, declaratory truth (that is, no right is absolute), the Court has made section 1 an integral step in *Charter* interpretation. If the Court finds that the statute in question restricts a *Charter* right, the judges then proceed to determine if this limitation is "reasonable" and "demonstrably justifiable." In its 1986 *Oakes* decision,<sup>91</sup> the Court laid down specific guidelines for applying section 1. The *Oakes* guidelines require that to qualify as a reasonable limitation,

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<sup>90</sup> *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54.

<sup>91</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103 [hereinafter *Oakes*].

the statute must serve a “pressing and substantial” purpose and that the means used must be proportional to the ends. The *Oakes* guidelines may have structured judicial discretion, but they certainly have not removed it.<sup>92</sup> In practice, *Oakes* amounts to a form of judicial balancing of ends and means: do the former justify the latter? Since the practical outcome of a case rides on this section 1 determination, a judge’s sensitivity to what Justice La Forest has called “second guessing” legislative choices,<sup>93</sup> is likely to influence how deferential or strict he or she is in applying the *Oakes* test. How then has the Court exercised its discretion under section 1?

Table 9 shows that, from 1984 through 1987, only one of eleven section 1 defenses of legislation was accepted by the Court. This is consistent with—indeed it supports—the Court’s initial activism. It may also reflect the unpreparedness of government lawyers for section 1 arguments, specifically the use of extrinsic evidence (for example, social data) to support the reasonableness of the challenged statute.<sup>94</sup> By contrast, in 1988 and 1989, the Court accepted eight of fourteen section 1 defenses. In practical terms, this means that the *Charter* challenge failed. The Court has also become divided over the treatment of section 1. There have been only four dissents in cases in which section 1 was decisive, and three of these occurred in 1989.<sup>95</sup> Also, the Justices differ in the consistency with which they use *Oakes* in responding to section 1 arguments.<sup>96</sup>

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<sup>92</sup> For a persuasive critique of the inherently subjective character of section 1 determinations, see S.R. Peck, “An Analytical Framework for Application of the Canadian *Charter of Rights and Freedoms*” (1987) 25 *Osgoode Hall L.J.* 1.

<sup>93</sup> Justice La Forest, concurring opinion in *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 [hereinafter *Edwards Books*].

<sup>94</sup> It is generally accepted that section 1 requires some empirical evidence, not just a government’s assertion, as to the compelling need for the law and the means used. See P.W. Hogg, *Canada Act 1982 Annotated* (Toronto: Carswell, 1982) at 10.

<sup>95</sup> *Edwards Books*, *supra*, note 93; *Andrews*, *supra*, note 57; *Cotroni*, *supra*, note 52; and *Edmonton Journal v. A.G. Alberta*, [1989] 2 S.C.R. 1326.

<sup>96</sup> See below, Table 16 at 43.

TABLE 9

## The Section 1 Reasonable Limits Defence by Year

	1984	1985	1986	1987	1988	1989	Total
<b>Section 1 Defence</b>							
Accepted	0	0	1	0	5	3	9
Rejected	2	4	2	2	4	2	16
Total	2	4	3	2	9	5	25

Table 10 reveals a similar trend for the exclusion of evidence under section 24(2). This section represents a significant and potentially controversial innovation in Canadian criminal law. Prior to 1982, Canadian judges usually accepted Crown evidence, even if police obtained it in a manner that violated the rights of the accused.<sup>97</sup> This was consistent with British practice, but diverged significantly from the American practice initiated by the U.S. Supreme Court's 1966 decision, *Mapp v. Ohio*,<sup>98</sup> to exclude evidence from trial if the police had violated the rights of the accused. In practice, this often meant an acquittal, since it was difficult to obtain a conviction without the evidence. After much controversy, the framers of the *Charter* adopted a compromise wording that would make the exclusion of evidence conditional upon the judges' finding that the admission of evidence "would bring the administration of justice into disrepute." Since this determination is far from self-evident, the practical effect of section 24(2) was dependant on how the Supreme Court interpreted it.

From 1984 through 1986, the Court accepted the only two exclusion motions that it heard. Since 1987, it has evenly divided on section 24(2) motions to exclude, rejecting eight and accepting eight. Section 24(2) prompted the first dissent<sup>99</sup> in the Supreme Court's

<sup>97</sup> See *R. v. Wray*, [1971] S.C.R. 272 and *Hogan v. R.*, [1975] 2 S.C.R. 574.

<sup>98</sup> 367 U.S. 643 (1961).

<sup>99</sup> Le Dain and McIntyre JJ. were the first *Charter* dissenters in *R. v. Therens*, [1985] 1 S.C.R. 613.

*Charter* jurisprudence and has divided the Court in three subsequent cases—more than any other section of the *Charter*.<sup>100</sup>

TABLE 10  
Motions to Exclude Evidence

	1984	1985	1986	1987	1988	1989	Total
Successful	0	1	1	3	2	3	10
Unsuccessful	0	0	0	3	3	2	8
Issue not addressed	0	0	0	2	3	1	6
Total	0	1	1	8	8	6	24

The close division in outcomes and the division within the Court on section 1 and section 24(2) arguments reflects the rather discretionary and subjective nature of applying these sections of the *Charter*. Deciding whether legislation is “reasonable” or whether the admission of unconstitutionally obtained evidence “would bring the administration of justice into disrepute” are not likely to become precise arts. The divisions which have developed within the Court over the Court’s proper role under the *Charter* can be understood as both the cause and effect of its changing and divided record on section 1 and section 24(2) issues.

## VIII. DIVISIONS WITHIN THE COURT

Since the opening activist honeymoon, the Court has become increasingly divided in its approach to the *Charter*. Table 11 shows how the Supreme Court’s initial consensus on interpreting and using the *Charter* has broken down. The percentage of unanimous decisions in *Charter* cases has fallen steadily.<sup>101</sup> Since 1986, there have been dissents

<sup>100</sup> *Collins v. R.*, [1987] 1 S.C.R. 265; *R. v. Dyment*, [1988] 2 S.C.R. 417; and *R. v. Ross*, [1989] 1 S.C.R. 3.

<sup>101</sup> Unlike Professor Heard, we define “unanimous” with reference only to the outcome of the case, regardless of concurring opinions.

in two out of every five *Charter* decisions. Meanwhile, the percentage of unanimous decisions in non-*Charter* cases has remained relatively steady in the 80 percent range, which is the same as pre-*Charter* practice.<sup>102</sup> This means that the growing dissension on the Court is limited to *Charter* cases.

TABLE 11

Unanimity in *Charter* and Non-*Charter* Cases

	<i>Charter Decisions</i>		<i>Non-Charter Decisions</i>	
	<i>No. of Decisions</i>	<i>% Unanimous</i>	<i>No. of Decisions</i>	<i>% Unanimous</i>
1984	4	100%	59	88%
1985	11	82%	72	83%
1986	11	55%	70	89%
1987	23	61%	72	85%
1988	25	64%	79	85%
1989	26	61%	97	77%
Total	100	65% (n = 65)	449	84% (n = 377)

A 60 percent unanimity rate is still high by American standards. During the same time period as our study, the American Supreme Court was unanimous in only 23.1 percent (39/169) of its *Bill of Rights* decisions and 37.7 percent overall (276/732).<sup>103</sup> These figures are consistent with trends over the past four decades. However, prior to the 1930s—that is, before the *Bill of Rights* became the most active part of its workload—the American Court also enjoyed unanimity in over 80 percent of its decisions.<sup>104</sup> With the advent of modern judicial review, and its preoccupation with rights and emphasis on judicial discretion, this

<sup>102</sup> See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill/Ryerson, 1987) at 351.

<sup>103</sup> Spaeth, *supra*, note 6.

<sup>104</sup> Abraham, *supra*, note 81 at 211.

consensus quickly evaporated.<sup>105</sup> Such increases in dissenting and concurring opinions also indicate judges who value the Court's political role over its legal role. It suggests that judges are increasingly willing to sacrifice the legal value of clarity of law that comes with unanimous decisions in order to promote their personal understandings of what the constitution requires or permits in terms of public policy. Since these conditions now apply in Canada, the declining consensus on the Canadian Court associated with the advent of the *Charter* may be only the beginning of a longer trend toward still greater dissension.

C. Herman Pritchett wrote about the American Supreme Court: "Dissent is usually not a game played in solitude; the great majority of all Supreme Court dissents are concurred in by two, three or four justices."<sup>106</sup> While it is true to a lesser degree of the Canadian Supreme Court, the study of dissenting voting patterns suggests that they are not random, but reflect a shared judicial philosophy. Table 12 presents the patterns of interagreement in dissents among the nine Justices who participated in a substantial number of the Supreme Court of Canada's first one hundred *Charter* decisions.<sup>107</sup>

Justices Wilson and McIntyre have dissented most frequently—thirteen and eleven times, respectively—but have never dissented together. Lamer and Dickson are the two Justices who have most frequently joined Wilson in dissent, while McIntyre has been relatively isolated in his dissents, with some support from L'Heureux-Dubé, after she joined the Court in 1987. Heard's recent study found similar

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<sup>105</sup> The concept of "modern judicial review" has been given a specific meaning by C. Wolfe. See *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law* (New York: Basic Books, 1986).

<sup>106</sup> Pritchett, *supra*, note 4 at 32.

<sup>107</sup> The top line records the number of cases in which a justice dissented. The columns below indicate the number of times the other Justices also dissented in the same cases. Solo dissents are shown in brackets. The table is arranged so that each Judge is placed closest to those with whom he or she joined in dissent most often and furthest from those with whom they dissented least often. A difficulty in interpreting levels of interagreement within the Canadian Supreme Court arises from the fact that the full Court rarely participates in decisions. Indeed, nine Justices participated in only eight of these first one hundred *Charter* cases. Thus, to some extent, levels of interagreement may be affected by the frequency with which Justices participate in the same area. This did not skew the results presented in Table 12, as Heard, *supra*, note 3, reached similar results using a different methodology that avoided this problem.



patterns of bilateral agreement between these Judges in all their *Charter* decisions, not just in their dissents.<sup>108</sup>

TABLE 12

## Pattern of Division: Interagreement in Dissents

1984-1989 Term	Wilson	Lamer	Dickson	Estey	Beetz	Le Dain	La Forest	L'Heureux -Dubé	McIntyre
No. of Dissents	13	9	6	3	3	1	3	3	11
Wilson	(5)	4	3	1			1	1	
Lamer	4	(2)	3		1			1	
Dickson	3	3	( )		1		1		
Estey	1			(1)					1
Beetz		1	1		( )				1
Le Dain						( )			1
La Forest	1		1				(1)		1
L'Heureux-Dubé	1	1						( )	2
McIntyre				1	1	1	1	2	(5)

Note:

Top row indicates number of dissenting judgments in which each justice participated.

(n) = the number of solo dissents authored by each justice.

n = the number of cases in which the two justices dissented together.

## IX. IDEOLOGICAL DIFFERENCES BETWEEN JUSTICES

While Table 12 indicates how the Court has divided over *Charter* interpretation, it does not provide any information as to the direction of the division. Tables 13 and 14 leave no doubt about the ideological nature of the cleavage within the Court. Wilson and Lamer are at the more activist end of the Court, while McIntyre and L'Heureux-Dubé have been the Justices most inclined to favour judicial self-restraint. Table 13 shows the vote orientation of the Justices in all of their *Charter*

<sup>108</sup> See Heard, *supra*, note 3.

decisions—unanimous as well as split decisions. Wilson has supported the *Charter* claimant in over half the cases she has participated in—a startling 53 percent. At the other extreme are L'Heureux-Dubé (15 percent) and McIntyre (23 percent), both less than half the rate of Wilson. Lamer, at 47 percent, is closest to Wilson, followed by Estey at 47 percent. The rest of the Justices fall into a wide middle ground ranging from 30 percent (La Forest) to 39 percent (Beetz). The Court average is 35 percent.

TABLE 13

Judges' Support for *Charter* Claimant by Year

	1984	1985	1986	1987	1988	1989	Total
Wilson	75% n=4	70% n=10	73% n=11	52% n=21	44% n=16	31% n=16	53% n=78
Lamer	75% n=4	69% n=11	44% n=9	42% n=19	55% n=18	28% n=18	47% n=79
Dickson	75% n=4	69% n=11	30% n=10	35% n=20	33% n=18	15% n=13	37% n=76
Estey	75% n=4	56% n=9	38% n=8	44% n=9	25% n=4	—	47% n=34
Beetz	75% n=4	75% n=8	11% n=9	25% n=16	31% n=16	67% n=6	39% n=59
Le Dain	100% n=1	57% n=7	22% n=9	33% n=18	29% n=7	—	36% n=42
La Forest	75% n=4	33% n=3	33% n=6	30% n=20	26% n=19	24% n=17	30% n=69
L'Heureux-Dubé	—	—	—	0% n=1	18% n=11	14% n=14	15% n=26
McIntyre	75% n=4	45% n=11	30% n=10	14% n=22	5% n=19	25% n=8	23% n=74
The Court	75% n=4	64% n=11	27% n=11	26% n=23	32% n=25	31% n=26	35% n=100

## Note:

n = number of cases in which a justice participated.

% = percent of n in which a justice supported the *Charter* claimant.

Table 14 indicates the same pattern with regard to dissents in split decisions. All of Wilson's and Lamer's dissents have come in decisions in which the *Charter* claimant has lost, whereas all but one of McIntyre's and L'Heureux-Dubé's dissents have been in cases in which the majority has favoured the *Charter* claimant.

TABLE 14

## Vote Orientation: Dissents

	Number of Dissents	Outcome of Majority Decision	
		Individual Wins	State Wins
Wilson	13	0	13
Lamer	9	0	9
Dickson	6	1	5
Estey	3	1	2
Beetz	3	1	2
Le Dain	1	1	0
La Forest	3	1	2
L'Heureux- Dubé	3	2	1
McIntyre	11	10	1
Total	52	17	35

It is interesting to observe the position of the then Chief Justice Dickson. Certainly, his voting record in Tables 12 and 13 shows that he has leaned towards the more activist end of the Court and has been more inclined than any other Justice to join Wilson and Lamer. On the other hand, he has not isolated himself at that end of the Court and has been able to play the role of an activist leaning leader on the Court. Evidence for this can be found in the fact that his overall voting record of favouring the *Charter* claimant in 37 percent of his decisions is almost the same as the overall Court average. Also, he has never dissented by himself.

Tables 15 through 17 throw further light on the ideological differences within the Court. Table 15 records the tendency of the

Justices' dissenting and concurring opinions to give a broader or narrower interpretation of the *Charter*. This table includes concurring opinions which are often written to mark out a significant departure from the interpretation advanced in the main opinion on either the majority or dissenting side. Hence, it is likely to give a fuller picture of the orientation of a Justice's *Charter* jurisprudence. Table 15 shows an even sharper cleavage than the voting tables. Whereas not one of the concurring and dissenting opinions of L'Heureux-Dubé and McIntyre supported a broader interpretation of the *Charter* section in question, all but three of those in which Wilson, Lamer, and Dickson have participated argue for a wider interpretation.

TABLE 15

Direction of *Charter* Interpretation in Dissenting and Concurring Opinions

	<i>Broader</i>	<i>Narrower</i>	<i>Same</i>
Wilson	28	2	1
Lamer	11	1	4
Dickson	12	1	3
Estey	2	4	1
Beetz	1	4	5
Le Dain	2	4	2
La Forest	5	5	2
L'Heureux-Dubé	0	3	0
McIntyre	0	16	6

Tables 16 and 17 are a further index of judicial activism and judicial self-restraint. They focus on how the Justices have responded to second stage *Charter* decisions based on the section 1 reasonable limitations defence and section 24(2) motions to exclude unconstitutionally obtained evidence. The willingness of a Justice to accept a section 1 defence of a statute that he or she has already found to limit a *Charter* right is an important indicator of self-restraint. Table 16 shows that L'Heureux-Dubé and La Forest were the Justices most deferential to the legislature in applying section 1. Justice McIntyre, it would seem, was

more inclined to exercise his self-restraint at the first stage of *Charter* cases by giving a narrow interpretation of *Charter* rights, thereby avoiding the need to even consider section 1 arguments in fourteen cases.

TABLE 16

## Section 1 Reasonable Limits Defence by Judge

	<i>Accepted/ Saved</i>	<i>Rejected/ Not Saved</i>	<i>Not Reached</i>	<i>No. of Cases<sup>a</sup></i>
Wilson	6	23	1	29
Lamer	8	17	0	24
Dickson	12	19	1	31
Estey	2	6	1	9
Beetz	6	12	7	24
Le Dain	4	5	5	14
La Forest	8	8	7	23
L'Heureux-Dubé	5	4	2	10
McIntyre	7	11	14	30

- a. The number of cases is sometimes fewer than row total because a justice may have more than one section 1 ruling in a single decision, e.g., *Devine v. A.G. Quebec*, *Black v. Law Society of Alberta*.
- b. When a section 1 defence is rejected because it is not "imposed by law," it is still counted as "rejected" (rather than "not reached"), e.g., Dickson C.J.C. in *R. v. Simmons*.

The striking feature of Table 17 on the exclusion of evidence is not a polarization at opposite ends of the Court, but the distinctive records of L'Heureux-Dubé and McIntyre. While most of the Court has been slightly more inclined to exclude evidence once a *Charter* violation has been established, these two Justices have favoured admitting it by a ratio of more than two to one. This pattern further supports the classification of L'Heureux-Dubé and McIntyre as exponents of judicial self-restraint, in this case driven perhaps by a crime control view of criminal justice.

TABLE 17

Exclusion of Evidence per Section 24(2) of the *Charter* (24 Cases)

	Evidence Excluded	Evidence Admitted	No Ruling	Total
Wilson	11	9	3	23
Lamer	12	9	4	25
Dickson	9	7	2	18
Estey	2	1	2	5
Beetz	7	5	1	13
Le Dain	4	4	2	10
La Forest	11	8	1	20
L'Heureux-Dubé	3	8	4	15
McIntyre	5	11	4	20
Total	64	62	23	149

The data presented in tables 11 to 17 make it clear that there is growing disagreement on the Supreme Court over how the *Charter* should be interpreted. The number of unanimous decisions decreased every year, while the number of dissenting opinions rose. Nor was this division random. The Court divided into two wings and a centre. The activist wing was led by Justice Wilson and included Justice Lamer and usually the Chief Justice. This bloc provided the most consistent support for *Charter* claimants, gave broader interpretations to *Charter* rights, and frequently dissented together, usually when the majority voted against the *Charter* claimant. They were also less likely to accept section 1 defenses and more likely to exclude evidence under section 24(2).

The other wing exemplified the philosophy of judicial self-restraint and was led by Justice McIntyre. While McIntyre lacked reliable allies, he managed to attract all members of the Court to join him in dissent at least once, except for the three members of the activist wing. After her appointment in 1987, Justice L'Heureux-Dubé frequently voted with Justice McIntyre. Justice La Forest was an occasional member of this bloc. All of them were much less likely to support *Charter* claims, tended to give narrower interpretations of the *Charter*,

were more receptive toward section 1 defenses, and more reluctant to dismiss illegally obtained evidence. The leader labels apply to Wilson and McIntyre because they are on the opposite ends of the activist/restraint spectrum in every table but one. They also led the Court in the number of dissents and the number of solo dissents, yet they never dissented together.

In sum, Wilson and McIntyre have developed very different theories of proper judicial review under the *Charter*, theories that consistently lead them to very different results. Lamer and Dickson seem to share Wilson's activist perspective, but are less consistent in following it. L'Heureux-Dubé and to a lesser extent, La Forest, are sympathetic to McIntyre's vision of judicial self-restraint. The other Justices have hewn to a more pragmatic, middle ground.

These empirical findings support and confirm Gold's earlier qualitative study of the Justices' different approaches to *Charter* interpretation.<sup>109</sup> They make it clear that in borderline cases—and thus far, no cases have involved clear-cut violations of well-established rights—it is the judge not the *Charter* that determines the outcome of the case.

This conclusion should come as no surprise to those familiar with the American Supreme Court. Particularly since 1937, it too has fragmented into different voting blocs with even wider discrepancies between the voting records of the judges. On the Burger Court (1968-1986), for example, support for civil liberties claims ranged from a high of 90.6 percent for Justice Douglas to a low of 19.6 percent for Justice Rehnquist.<sup>110</sup> Canadian and American experiences, however, diverge at this point. In the U.S., the perception of federal judges as essentially political actors has given rise to an increasingly partisan competition over judicial appointments. The "Bork Affair" was only the most recent and most visible incident in this struggle.<sup>111</sup> Such nakedly partisan attempts to shape the outcome of the Supreme Court's decisions by strategic judicial appointments sit poorly with traditional concepts of

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<sup>109</sup> Gold, *supra*, note 27 at 508.

<sup>110</sup> J.A. Segal & H.J. Spaeth, "Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project" (1989) 73 *Judicature* 103 at 107.

<sup>111</sup> For the liberal view of this struggle, see H. Schwartz, *Packing the Courts: The Conservative Campaign to Rewrite the Constitution* (New York: Scribners and Sons, 1988). For the conservative view, see G.L. McDowell, *Curbing the Courts: the Constitution and the Limits of Judicial Power* (Baton Rouge, La.: Louisiana State University Press, 1988).

judicial independence and impartiality. In practice, however, it is consistent with interest group behaviour in contemporary Western democracies. As V.O. Key has written: "Where power rests, there influence will be brought to bear."<sup>112</sup> Courts that act politically will come to be treated politically.

In Canada, however, there has thus far been no evidence that the federal government has let ideological criteria influence its Supreme Court appointments.<sup>113</sup> Nor has there been much popular interest in following the American practice of subjecting the views of Supreme Court justices to public examination before they are appointed.<sup>114</sup> Unlike Americans, it would appear that Canadians prefer to remain in a state of ideological innocence about their judges. This traditional, legalistic view of judges may be the legacy of the dominant English influence in Canadian law prior to 1982. Further evidence of differences within the Court on *Charter* issues may well transform the public's perception that the Supreme Court is "above politics."

A recent exception to this is the apparently successful effort by Canadian feminist organizations to have the Canadian Judicial Centre sponsor special education seminars for judges on sexual equality and systemic discrimination. From a political science/judicial process perspective, this is analogous to the efforts of American feminists to prevent judges like Robert Bork from being appointed, except that this lobbying occurs after the appointment and is directed at the appointee rather than the appointers. The common denominator of both tactics is the perception that judges can and do use their discretion in interpreting constitutional rights to alter public policy. Since there is no opportunity to exert influence prior to the appointment, such as the hearings of the

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<sup>112</sup> V.O. Key, *Politics, Parties, and Pressure Groups* (New York: Thomas Y. Crowell, 1958) at 154. Key was explaining the lobbying behaviour of interest groups in the American political system. It was written in 1958 and referred to lobbyists' concentration on Congressional committees and administrative agencies, but can be used to explain events like the Bork Affair.

<sup>113</sup> There is, however, considerable evidence that partisan patronage has been a major factor in lower court appointments. See P.H. Russell & J. Zeigel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and New Judicial Advisory Committees" (1991) U.T.L.J. 4 at 22.

<sup>114</sup> For arguments in favour of public review, see F.L. Morton, "Charter Changed Justices' Role" in M. Charlton & P. Barker, eds, *Cross Currents I: Contemporary Political Issues* (Toronto: Nelson Canada, 1991) at 241 [hereinafter *Cross Currents*]. For a rebuttal, see I. Hunter, "Confirmation Hearings for Judges Would Lower Quality of the Court" in *Cross Currents*, *ibid.* at 244.



Senate Judiciary Committee in the United States, Canadian interest groups are forced to seek access after the appointment. This novel spectacle of special education seminars for judges provides just such a forum. Not surprisingly, anti-feminist groups have protested what they view as a privileged audience with the judges.<sup>115</sup> Since presumably other Canadian interest groups would also welcome the opportunity to present their points of view to Canadian judges, it will be interesting to see whether this practice is expanded or eliminated.

At a minimum, the growing perception of “different judges, different rights” is likely to produce demands that the Supreme Court cease its current practice of sitting in panels of seven or fewer Justices—something they did in approximately 75 percent of their first one hundred *Charter* decisions. In these cases, the outcome of a *Charter* challenge may be largely determined by the selection of Justices for the panel that hears the case, rather than the merits of the case.<sup>116</sup> The prospects of a *Charter* claimant are much better before a five judge panel which includes Chief Justice Dickson and Justices Lamer and Wilson, rather than one which includes Justices McIntyre, L’Heureux-Dubé, and La Forest. Awareness of this fact will generate increasing pressure to organize the Court’s work so that all nine Justices participate in *Charter* cases.

## X. CONCLUSIONS

The *Charter* has ushered in a new era for the Supreme Court of Canada. Nineteen eighty-two marks a turning point for the Court equal in importance to the abolition of appeals to the Judicial Committee of the Privy Council in 1949. After only eight years, the *Charter* now constitutes one-quarter of the Supreme Court’s annual workload. The Court has made a clean break with the British-style judicial self-restraint that characterized its interpretation of the 1960 *Canadian Bill of Rights*. The Court has upheld *Charter* claimants in 35 percent of its first one hundred decisions and declared nineteen statutes void for *Charter*

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<sup>115</sup> G. Landolt, President of REAL Women: “We’re saying, if you’ve got an argument to make, line up like everyone else and make your case in court.” See G. Heaton & P. Taylor, “Justice and Gender” (1990) 17:11 *Western Report* 34 at 35.

<sup>116</sup> For a thorough analysis of this point, see Heard, *supra*, note 3.

infractions. The comparable figures for the *Canadian Bill of Rights* were 15 percent and one statute, respectively. In all three of these important respects—composition of docket, success rate, and nullification of statutes—there is no longer any appreciable difference between the Supreme Court's *Charter* work and the American Supreme Court's work under the *Bill of Rights*. These findings lend support to Lipset's hypothesis that the *Charter* is "Americanizing" the practice of politics in Canada.<sup>117</sup>

Like its American counterpart, the Supreme Court now routinely finds itself in the thick of the political process. Seventy-five percent of the Court's *Charter* work has dealt with legal rights and criminal justice. While most of these decisions have not touched on issues of great public interest, the exceptions are important, in particular, abortion and language rights. The impact of the *Charter* on the provinces has been qualitatively greater than its effect on federal law making.

Our study confirms a growing dissension within the Court over *Charter* interpretation since 1986 and argues that this accounts for the decline of successful *Charter* challenges after 1985. We document the division on the Court between activists (Wilson and Lamer) and non-activists (McIntyre and L'Heureux-Dubé) and suggest that such division was more or less inevitable given the inescapably contentious character of modern judicial review. Comparative data from American experience suggests that such division is to be expected and is even likely to increase.

For the country too, the *Charter*, which was promoted as an instrument of national unity, is ironically becoming a source of disunity with respect to Quebec. The Supreme Court's application of the *Charter*, while by no means the sole explanation of this tendency, has been a contributing factor. Among the provinces, Quebec's legislature experienced the most serious reversals in the Supreme Court's first one hundred *Charter* cases. Likewise, the Quebec Court of Appeal has been reversed more often than any other provincial court of appeal. With respect to the *Charter*, Quebec may already be well on its way to becoming a distinct society.

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<sup>117</sup> S.M. Lipset, *Continental Divide: The Values and Institutions of the United States and Canada* (Toronto: Canadian-American Committee, 1989) at 116.

APPENDIX I:  
RULES FOR COUNTING SUPREME COURT *CHARTER* CASES

Counting Supreme Court *Charter* cases is not a simple task. A number of issues arise both as to what should count as a Supreme Court decision, and how the result of a decision should be classified. How these issues are resolved affects the outcome of quantitative research. We do not think there is one correct way of handling these issues. Researchers will follow rules best suited to their research objectives. However, we do think it is important for those presenting quantitative studies of the Court's work to state the rules they have followed in selecting and classifying cases. Only in this way will the scholarly community have an adequate basis for interpreting the results of different studies. It is in this spirit that we set out below the rules adopted for this particular study. We have done this in some detail in the hope that our explanation of the issues and reasons for our particular treatment of these issues will elicit some comment which might help us and other scholars in future quantitative studies in this field.

1. *The source of our data*

We have based our study on the first one hundred cases dealing with constitutionally entrenched rights and freedoms reported in the Supreme Court Reports since the Supreme Court's first decision on the *Charter* in *Law Society of Upper Canada v. Skapinker*.<sup>1</sup> The cases are listed in Appendix II of this paper.<sup>2</sup> It is our understanding that all of the Court's decisions on the merits are now reported in the Supreme Court Reports. But decisions on applications for leave to appeal are not reported. This means that we do not present data on how the Supreme Court has dealt with applications for leave to appeal in *Charter* cases.

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<sup>1</sup> [1984] 1 S.C.R. 357.

<sup>2</sup> See below at 54.

## 2. *Cases decided without reasons*

On a number of occasions, the Court has decided *Charter* appeals without giving reasons. We have counted these cases as *Charter* decisions because the upholding or overturning of lower court decisions can have a national impact on *Charter* jurisprudence. A recent example is *Reference Re Workers' Compensation Act, 1983 (Nfld.)*,<sup>3</sup> where the Court agreed without reasons with the decision of Newfoundland's Court of Appeal which rejected an equality right challenge to that province's *Workers' Compensation Act*. The Court gave national effect to the Newfoundland Court's decision, thus insulating similar legislation in other provinces from a *Charter* challenge. Note that these cases are not counted for purposes of studying the voting records of individual justices in Tables 12 to 17.<sup>4</sup>

## 3. *Cases decided at the same time raising the same issue*

Occasionally the Court will group together one or more appeals from different jurisdictions which raise essentially the same issue. It decides one of the appeals with full reasons and then decides the others simply by applying the reasons given in the first case. An early example is the trio of *Therens*,<sup>5</sup> *Trask*,<sup>6</sup> and *Rahn*,<sup>7</sup> in which the Court decided *Trask* and *Rahn* simply by applying its reasons in *Therens*. In a situation like this, where the Court finds no significant difference in the facts of the cases and decides them at the same time and for the same reasons, we have counted the decisions as a single case. For a national court of appeal, as contrasted with a trial court, what really counts in assessing the impact of its decisions is the jurisprudential precedents they establish. In a situation such as the *Therens* trilogy, only one such

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<sup>3</sup> [1989] 1 S.C.R. 922.

<sup>4</sup> See above at 39-44.

<sup>5</sup> *R. v. Therens*, [1985] 1 S.C.R. 613.

<sup>6</sup> *Trask v. R.*, [1985] 1 S.C.R. 655.

<sup>7</sup> *Rahn v. R.*, [1985] 1 S.C.R. 659.

precedent is established. Note that for purposes of Tables 3 and 4, however, these companion cases are counted separately.<sup>8</sup>

#### 4. Cases decided on the basis of non-entrenched rights

We have excluded cases decided solely on the basis of the *Canadian Bill of Rights*, federal and provincial human rights statutes or charters, or common law rights. While some of these decisions may be more important politically than many *Charter* cases, they fall outside the scope of this study. However, we have included a case such as *Singh v. Ministry of Employment and Immigration*,<sup>9</sup> where three Judges based their decision on the *Canadian Bill of Rights* and three Judges based their decision on the *Charter*. We excluded cases based on statutory or common law rights because we think the Court's decisions usually have their greatest significance when they involve the interpretation and application of constitutional rights and freedoms.

#### 5. Cases dealing with constitutional rights and freedoms entrenched outside the Charter

For the same reason that we excluded decisions concerning rights and freedoms that are not constitutionally entrenched, we included decisions on rights entrenched in other parts of the Constitution that were rendered since the Court's first *Charter* decision. The main examples are the minority education and language rights entrenched in sections 93 and 133 of the *Constitution Act, 1867*,<sup>10</sup> the language rights in section 23 of the *Manitoba Act*,<sup>11</sup> and the rights of Aboriginal peoples in section 35 of the *Constitution Act, 1982*.<sup>12</sup> Although the Supreme Court has now rendered a decision on section 35

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<sup>8</sup> See below, Appendix II at 54, cases 9, 47, 49, 90, 92, and 95.

<sup>9</sup> [1985] 1 S.C.R. 177.

<sup>10</sup> (U.K.), 30 & 31 Vict., c. 3.

<sup>11</sup> S.C. 1870, c. 3.

<sup>12</sup> Being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11.

Aboriginal rights in *R. v. Sparrow*,<sup>13</sup> it is not within the first one hundred *Charter* cases and therefore beyond the scope of our study. Our one hundred cases do include several decisions on minority education and language rights entrenched outside the *Charter*, for example, the *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*<sup>14</sup> and the *Reference Re Manitoba Language Rights*.<sup>15</sup> Including these cases does mean that our study covers a little more than pure *Charter* cases, but it seems artificial to exclude these cases when the jurisprudential issues they raise and their constitutional significance are so akin to those involved in *Charter* cases. A borderline case for us was *R. v. Mercure*,<sup>16</sup> in which the Court, in effect, decided that French language rights in Saskatchewan (and by implication, Alberta) were based on statutory rather than constitutional rights. In the end, we decided to include this case because it made an important ruling on the extent of entrenched language rights.

6. *Cases in which the Charter was argued but the decision was based on non-Charter grounds*

In a number of cases, where one of the parties advanced a *Charter* claim, the Court decided the case on other grounds. An example is *Westendorp v. R.*,<sup>17</sup> in which the Court decided the case on division of powers grounds and did not deal with the *Charter*. While these cases do show the Court's reluctance to deal with *Charter* claims unnecessarily, we have excluded them as they do not establish jurisprudential precedents on constitutional rights.

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<sup>13</sup> [1990] 1 S.C.R. 1075.

<sup>14</sup> [1987] 1 S.C.R. 1148.

<sup>15</sup> [1985] 2 S.C.R. 347.

<sup>16</sup> [1988] 1 S.C.R. 234.

<sup>17</sup> [1983] 1 S.C.R. 43.

### 7. Cases involving non-substantive rulings on the Charter

We have included cases decided on the basis of procedural or jurisdictional issues concerning the *Charter*. Examples are *R. v. James*,<sup>18</sup> where the Court decided the *Charter* did not have retrospective effect, and *Borowski v. A.G. Canada*,<sup>19</sup> in which the Court ruled that a *Charter* claim was not justiciable. The decisions in these cases have an important effect on the scope of the *Charter*'s applicability.

### 8. Wins and losses

In classifying a *Charter* case as a "win" or a "loss" we considered only the effect of the Court's decision on the *Charter* claimant's petition. That is, did the *Charter* claimant get what he or she wanted from the Court? A case in which the Court found that a law violated a *Charter* right, but then upheld the law on the grounds that it constituted a "reasonable limit" under section 1 is counted as a loss. Similarly, we counted a case as a loss if the Court found that the police violated an accused person's *Charter* rights, but nevertheless, under section 24(2), refused to exclude evidence resulting from the *Charter* violation. A case in which the *Charter* claimant failed with one or more *Charter* claims but won at least one other *Charter* claim, is still counted as a win if he or she received the desired result on the basis of the one successful *Charter* claim. A case is put in the "inconclusive" category only when the actual results (not simply doctrinal holdings) are a mixture of success and failure for the *Charter* claimant. Examples of cases with such outcomes are *Krug v. R.*,<sup>20</sup> and *Devine v. A.G. Quebec*.<sup>21</sup> In these cases, the Court found some sections of the impugned legislation unconstitutional, but upheld other parts of the legislation as valid.

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<sup>18</sup> [1988] 1 S.C.R. 669.

<sup>19</sup> [1989] 1 S.C.R. 342.

<sup>20</sup> [1985] 2 S.C.R. 255.

<sup>21</sup> [1988] 2 S.C.R. 790.

APPENDIX II:  
THE SUPREME COURT OF CANADA'S FIRST ONE HUNDRED  
CHARTER DECISIONS\*

1. *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357.
2. *A.G. Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66.
3. *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.
4. *A.G. Quebec v. Greater Hull School Board*, [1984] 2 S.C.R. 575.
5. *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.
6. *R. v. Big M Drug Mart Ltd*, [1985] 1 S.C.R. 295.
7. *Staranchuk v. R.*, [1985] 1 S.C.R. 439.
8. *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441.
9. *R. v. Therens*, [1985] 1 S.C.R. 613; *Trask v. R.*, [1985] 1 S.C.R. 655; and *Rahn v. R.*, [1985] 1 S.C.R. 659.
10. *Reference Re Manitoba Language Rights*, [1985] 2 S.C.R. 347.
11. *Krug v. R.*, [1985] 2 S.C.R. 255.
12. *Spencer v. R.*, [1985] 2 S.C.R. 278.
13. *Dubois v. R.*, [1985] 2 S.C.R. 350.
14. *Reference Re s. 94(2) of the Motor Vehicle Act (B.C.)*, [1985] 2 S.C.R. 486.
15. *Valente v. R.*, [1985] 2 S.C.R. 673.
16. *R. v. Oakes*, [1986] 1 S.C.R. 103.
17. *Clarkson v. R.*, [1986] 1 S.C.R. 383.
18. *Bilodeau v. A.G. Manitoba*, [1986] 1 S.C.R. 449.
19. *MacDonald v. Montreal (City of)*, [1986] 1 S.C.R. 460.
20. *Société des Acadiens du Nouveau-Brunswick Inc. v. Association of Parents*, [1986] 1 S.C.R. 549.
21. *Mills v. R.*, [1986] 1 S.C.R. 863.
22. *Carter v. R.*, [1986] 1 S.C.R. 981.
23. *R. v. Mannion*, [1986] 2 S.C.R. 272.
24. *Jones v. R.*, [1986] 2 S.C.R. 284.
25. *R.W.D.S.U. v. Dolphin Delivery Ltd*, [1986] 2 S.C.R. 573.
26. *R. v. Edwards Books and Art Ltd*, [1986] 2 S.C.R. 713.
27. *A.G. Manitoba v. Metropolitan Stores Ltd*, [1987] 1 S.C.R. 110.
28. *Collins v. R.*, [1987] 1 S.C.R. 265.

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\* Including language and education rights cases based on sections 93 and 133 of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; section 23 of the *Manitoba Act*, S.C. 1870, c. 3; and section 16 of the *Saskatchewan Act*, S.C. 1905, c. 42.



29. *R. v. Hamill*, [1987] 1 S.C.R. 301 and *R. v. Sieben*, [1987] 1 S.C.R. 295.
30. *Reference Re Public Service Employees Relations Act (Alta.)*, [1987] 1 S.C.R. 313.
31. *P.S.A.C. v. Canada*, [1987] 1 S.C.R. 424.
32. *R.W.D.S.U. v. Saskatchewan*, [1987] 1 S.C.R. 460.
33. *Canada v. Schmidt*, [1987] 1 S.C.R. 500.
34. *Argentina v. Mellino*, [1987] 1 S.C.R. 536.
35. *U.S.A. v. Allard*, [1987] 1 S.C.R. 564.
36. *R. v. Rahey*, [1987] 1 S.C.R. 588.
37. *R. v. Pohoretsky*, [1987] 1 S.C.R. 945.
38. *R. v. Smith*, [1987] 1 S.C.R. 1045.
39. *Reference Re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148.
40. *R. v. Manninen*, [1987] 1 S.C.R. 1233.
41. *R. v. Lyons*, [1987] 2 S.C.R. 309.
42. *R. v. Albright*, [1987] 2 S.C.R. 383.
43. *R. v. Tremblay*, [1987] 2 S.C.R. 435.
44. *R. v. Dawson*, [1987] 2 S.C.R. 461.
45. *R. v. Milne*, [1987] 2 S.C.R. 512.
46. *R. v. Baig*, [1987] 2 S.C.R. 537.
47. *R. v. Wigglesworth*, [1987] 2 S.C.R. 541; *Trumbley and Pugh v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 577; and *Trimm v. Durham Regional Police*, [1987] 2 S.C.R. 582.
48. *Burnham v. Metropolitan Toronto Police*, [1987] 2 S.C.R. 572.
49. *R. v. Vaillancourt*, [1987] 2 S.C.R. 636 and *R. v. Laviolette*, [1987] 2 S.C.R. 667.
50. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.
51. *R. v. Mercure*, [1988] 1 S.C.R. 234.
52. *R. v. Hufsky*, [1988] 1 S.C.R. 621.
53. *R. v. Thomsen*, [1988] 1 S.C.R. 640.
54. *R. v. Dairy Supplies Ltd*, [1988] 1 S.C.R. 665.
55. *R. v. James*, [1988] 1 S.C.R. 669.
56. *R. v. Corbett*, [1988] 1 S.C.R. 670.
57. *R. v. Holmes*, [1988] 1 S.C.R. 914.
58. *R. v. Vermette*, [1988] 1 S.C.R. 985.
59. *Corporation Professionnelle des Médecins du Québec v. Thibault*, [1988] 1 S.C.R. 1033.
60. *R. v. Upston*, [1988] 1 S.C.R. 1083.
61. *R. v. Stevens*, [1988] 1 S.C.R. 1153.
62. *R. v. Whyte*, [1988] 2 S.C.R. 3.
63. *Canadian Newspapers Co. v. A.G. Canada*, [1988] 2 S.C.R. 122.
64. *B.C.G.E.U. v. A.G. British Columbia*, [1988] 2 S.C.R. 214.
65. *R. v. Beare*; *R. v. Higgins*, [1988] 2 S.C.R. 387.

66. *R. v. Dymont*, [1988] 2 S.C.R. 417.
67. *R. v. Schwartz*, [1988] 2 S.C.R. 443.
68. *R. v. Simmons*, [1988] 2 S.C.R. 495.
69. *R. v. Jacoy*, [1988] 2 S.C.R. 548.
70. *R. v. Gamble*, [1988] 2 S.C.R. 595.
71. *Ford v. A.G. Quebec*, [1988] 2 S.C.R. 712.
72. *Devine v. A.G. Quebec*, [1988] 2 S.C.R. 790.
73. *R. v. Bernard*, [1988] 2 S.C.R. 833.
74. *R. v. Strachan*, [1988] 2 S.C.R. 980.
75. *R. v. Ross*, [1989] 1 S.C.R. 3.
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