Osgoode Hall Law Journal

Volume 30, Number 4 (Winter 1992)

Article 1

The Supreme Court in the 1980s: A Commentary on the S.C.R. Statistics

Peter H. Russell

THE SUPREME COURT IN THE 1980s: A COMMENTARY ON THE S.C.R. STATISTICS©

BY PETER H. RUSSELL*

Scholars interested in the Supreme Court of Canada will be pleased to see that the *Osgoode Hall Law Journal* has revived its practice of publishing annual data on the work of the Court, as reported in the *Supreme Court Reports*. While quantitative information of this kind is no substitute for jurisprudential analysis, it does provide a general picture of how the Court and its justices expend their jurisprudential energies. Such quantitative data can also generate hypotheses about the impact the Court is having on the legal system and about the orientation of its judges.

The editors asked me to comment on the annual tables they have produced for the decade from 1981 to 1990. I agreed to do so on the condition that they produce some overall tables summarizing the different categories of data for the entire ten years. This they have done and the comments that follow are based on these summary tables. I have commented only on broad trends that can be gleaned from the tables without doing tests of statistical significance. Other scholars, better equipped for quantitative analysis, will, I hope, draw on these tables and the data bank from which they are derived for more sophisticated and detailed analyses.

I. VOLUME, NATURE, AND SOURCE OF CASE LOAD

The data in Table 1 on the Court's overall volume of work show how, after a sharp sag in the middle of the decade, the Court was able to

---

* Professor of Political Science, University of Toronto.

recover and even exceed its earlier decision-making capacity. The mid-1980s decline in decisions on the merits (the S.C.R. data does include the Court's leave-granting work), as my colleagues Morton and Withey and I argued in a recent contribution to this Journal,[1] reflected temporary problems resulting from the poor health of several justices and lengthy deliberations in deciding the first *Canadian Charter of Rights and Freedoms*[2] cases.

TABLE 1
Volume of Work

Years	# of Cases	Private	Affirmed/ Reversed (%)	Public	Affirmed Reversed (%)	# Reported Motions
1981	105	35	46	73	66	3
1982	116	32	63	89	66	6
1983	87	25	77	64	44	1
1984	63	13	38	53	58	2
1985	84	16	60	73	58	0
1986	75	19	65	59	62	0
1987	93	18	35	76	68	1
1988	104	19	33	86	65	2
1989	127	27	37	105	62	7
1990	134	29	57	110	66	5
TOTAL	988	233	52	788	62	28

The rise in the Court's output towards the end of the decade can be attributed mainly to the *Charter*. This becomes clear from a perusal of Table 2 showing the subject matter of litigation before the Court. The most dramatic increase is recorded in the *Charter* row, especially during the last four years. The volume of criminal cases is up too—again particularly over the last four years.

[1] F.L. Morton, P.H. Russell & M.J. Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1 at 6-7.

[2] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

TABLE 2

Subject Matter of Litigation

Subjects	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990
References	0	0	0	1	2	0	0	0	0	1
Admin & Succ'n	0	0	1	0	0	0	0	0	0	0
Commercial	14	18	11	4	11	7	9	5	13	12
Family Law	2	6	4	3	3	4	5	3	2	3
Intellectual Prop	1	2	0	1	0	0	0	0	2	2
Land	3	2	1	3	2	3	2	2	0	1
Torts	5	2	6	3	4	3	1	2	3	4
Other Private	7	3	4	1	2	5	1	5	11	6
Civil Law	13	8	6	3	3	0	3	4	11	9
Administrative	7	8	6	6	5	1	6	2	4	4
Charter				3	12	9	26	24	35	53
Constitutional	12	12	11	9	6	6	6	13	13	16
Criminal	32	35	29	23	29	21	36	46	41	52
Labour	8	10	7	6	5	3	4	3	3	4
Other Public	15	26	31	19	24	17	15	22	25	15
Procedural	22	38	32	18	34	24	31	30	51	48
Aff'd Crim/	22	24	13	16	18	12	23	32	29	39
Total Crim	32	35	29	23	29	21	36	46	41	52
Aff'd Others/	57	80	62	39	57	52	64	67	93	118
Total Others	109	135	120	79	111	83	110	115	173	178

Total of Criminal Cases:
Affirmed = 226 Total Criminal Cases = 344 Ratio = .657

Total of All Other Cases:
Affirmed = 684 Total of Other Cases = 1,213 Ratio = .564

Much of the increase in the criminal case load has undoubtedly been generated by the *Charter*. (It should be noted that cases that raise both constitutional and criminal law issues are counted twice—indeed even thrice if they also raise a division of powers issue.[3]) The relatively stable case-load levels in the other categories show that the Court has dealt with its new *Charter* work not by reducing its work in other areas but by increasing its overall output.

The *Charter* has increased the Supreme Court's public law emphasis. However, while private law cases as a proportion of the Court's overall case load fell during the decade from roughly 30 per cent to 20 per cent, Tables 1 and 2 show that there has been no marked decline in the aggregate number of cases dealt with in the main private law categories. The slightly higher ratio of public law cases in which the Court affirmed lower court decisions suggests that, in considering leave applications, the Court may apply a tougher standard of scrutiny in private law cases than in public law cases, and grant leave only where there are strong grounds for questioning the decision below. Another factor at work may be the continuation of a right to appeal in certain criminal cases. The calculation shown at the bottom of Table 2 indicates that the affirmed ratio is particularly high in criminal cases.

The point that jumps out from Table 3, which demonstrates the source of Supreme Court appeals, is the variance in the frequency of Supreme Court concurrence with the various, intermediate courts of appeal. The Supreme Court appears more likely to uphold judgments of Ontario, British Columbia, and Alberta courts of appeal than judgments of other courts whose decisions are frequently reviewed. On the other hand, the Federal Court of Appeal has experienced by far the highest frequency of reversals. Indeed its reversal rate of nearly two-thirds approximately matches the affirmation rate from the three largest common law provinces. These disparities raise interesting speculations on the jurisprudential kinships and differences, which have developed among these courts.

---

[3] A criminal case that raised Charter issues, division of powers issues, and non-constitutional criminal law issues would be listed under "Charter," "Constitutional," and "Criminal".

TABLE 3
Total Appellate Decisions From Source
(Number of Cases / # Affirmed - # Reversed)

Jurisdiction	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Tot.	Aff'd/ Tot. (%)
Alberta	9 8-1	10 6-5	8 3-5	8 7-1	10 4-6	6 4-1	7 4-2	7 6-2	15 12-4	13 8-5	93 63	67.7
BC	7 5-2	12 6-6	8 4-5	9 9-1	9 7-3	11 10-3	11 6-2	18 14-4	22 14-13	21 16-5	130 91	70.0
Manitoba	10 3-5	4 2-2	7 3-4	1 1-0	6 3-3	5 3-2	9 5-4	7 4-3	12 5-7	15 6-8	76 35	46.1
N.B.	2 2-1	5 2-2	4 1-3	1 1-0	0 0-0	3 2-1	3 1-2	7 2-4	1 0-1	2 2-0	28 13	46.4
Nfld & Lab	2 0-1	3 2-1	0 0-0	1 0-1	1 0-1	0 0-0	1 1-0	3 3-0	5 3-3	1 1-0	17 10	58.8
NWT	0 0-0	0 0-0	0 0-0	0 0-0	1 1-0	0 0-0	0 0-0	0 0-0	0 0-0	1 1-0	2 2	100.0
Nova Scotia	3 1-2	4 3-1	5 5-3	0 0-0	4 1-3	4 1-3	5 3-1	0 0-0	6 4-2	3 0-3	34 17	50.0
Ontario	29 15-14	26 18-9	19 13-7	19 12-9	23 19-5	17 10-7	22 20-2	26 19-8	18 13-4	38 28-9	237 167	70.5
P.E.I.	0 0-0	2 2-0	0 0-0	0 0-0	0 0-0	1 0-1	1 0-0	1 1-0	0 0-0	0 0-0	5 3	60.0
Quebec	29 19-10	24 20-6	17 15-5	13 2-10	17 9-7	14 9-5	17 3-9	25 10-15	26 10-15	22 16-7	204 113	55.4
Sask.	4 3-1	5 2-3	3 1-2	2 1-1	3 2-1	2 0-2	5 4-1	5 3-2	8 4-3	8 5-3	45 25	55.6
Y.T.	0 0-0	1 1-0	0 0-0	0 0-0	0 0-0	1 1-0	2 2-0	0 0-0	0 0-0	1 0-1	5 4	80.0
Court Martial A.C.	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	1 1-0	0 0-0	1 1	100.0
Federal Board	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0-0	0 0	0
Federal Court	12 7-6	20 13-6	16 7-11	8 2-7	8 4-5	11 8	10	5	13	10	173	36.4

Table 4, Majority/Dissent ratios, shows a slightly declining rate of agreement within the Court. The frequency of unanimous decisions has fallen from a high of 87 per cent at the beginning of the decade to a low of 68 per cent in 1990. Again the *Charter* is probably the main explanation for this trend. From Table 13 below, showing majority/dissent ratios in *Charter* cases, we can see that overall, the frequency of unanimous decisions in *Charter* cases has only been 60 per cent, and, since the initial "honeymoon period" of 1985-86, it has been only 57 per cent. Still, the Canadian Supreme Court has a long way to go before it reaches the degree of dissension within the United States Supreme Court where the unanimity rate has been barely 20 per cent.[4] The even greater prominence of the constitutional rights issue on that court's docket is a key to its high frequency of split decisions.

TABLE 4

Majority/Dissent Ratios

Decisions	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Total
Unanimous	95	103	72	57	74	62	77	85	101	97	824
Split	14	19	15	8	10	14	17	21	37	45	200
% Frequency of Unanimous	87.2	84.4	82.8	87.7	88.1	81.6	81.9	80.2	73.2	68.3	80.5
Full Panels (9 & 8 Justices)											
9:0	18	24	3	1	6	3	2	0	8	10	
8:1	2	0	1	0	0	1	1	0	1	1	
7:2	3	3	0	0	1	1	0	0	2	1	
6:3	2	3	0	0	1	2	0	0	0	2	
5:4	0	2	1	0	1	0	0	0	0	3	
8:0	1	0	0	4	2	0	5	1	0	1	
7:1	0	0	0	1	0	0	1	0	0	0	
6:2	0	0	0	0	1	0	0	1	0	0	
5:3	1	0	0	0	0	0	0	2	0	0	
4:4	0	0	0	0	0	0	0	0	0	0	
Subtotal	27	32	5	6	12	7	9	4	11	18	131
% Frequency	24.5	26.2	5.7	9.2	14.3	9.2	9.6	3.8	8.0	12.7	12.8

[4] H.J. Abraham, *The Judicial Process: an Introductory Analysis of the Courts of the United States, England and France*, 4th ed. (New York: Oxford University Press, 1980) at 214.

Decisions	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Total
Medium Panels (7 & 6 Justices)											
7:0	33	41	32	21	47	38	23	21	30	57	
6:1	0	2	2	1	2	4	3	0	4	8	
5:2	1	3	4	0	1	1	4	3	5	9	
4:3	2	1	4	1	2	4	0	5	5	12	
6:0	0	0	0	5	12	0	17	18	12	2	
5:1	0	0	0	0	0	0	5	2	4	0	
4:2	0	0	0	3	0	0	2	1	4	4	
3:3	0	0	0	0	0	0	0	0	0	0	
Subtotal	36	47	42	31	64	47	54	50	64	92	527
% Frequency	33.0	38.5	48.3	47.7	76.2	61.8	57.4	47.2	46.4	64.8	51.5
Small Panels (5 & 4 Justices)											
5:0	42	35	38	23	6	20	24	39	40	25	
4:1	2	1	3	0	0	0	1	3	2	0	
3:2	1	4	0	2	1	1	0	3	6	5	
4:0	0	0	0	3	1	1	6	6	6	0	
3:1	0	0	0	0	0	0	0	1	1	0	
2:2	0	0	0	0	0	0	0	0	0	0	
Subtotal	45	40	41	28	8	22	31	52	55	30	351
% Frequency	40.9	32.8	47.1	43.1	9.5	28.9	33.0	49.1	39.9	21.1	34.3
3:0	1	2	0	0	0	0	0	0	0	2	
2:1	0	0	0	0	0	0	0	0	0	0	
1:0	0	1	0	0	0	0	0	0	4	0	

Full Panels (9-8)	Unanimous Decisions = 89	Split Decisions = 42
	% Frequency of Unanimous Decisions = 67.9	
Medium Panels (7-6)	Unanimous Decisions = 409	Split Decisions = 118
	% Frequency of Unanimous Decisions = 77.6	
Small Panels (5-4)	Unanimous Decisions = 315	Split Decisions = 37
	% Frequency of Unanimous Decisions = 89.5	

Table 4 shows that decision making by the full bench of nine justices is still relatively rare. Most of the cases are heard by panels of five, six, or seven justices. It is difficult to understand the justification for this policy. Can it really be true that only 13 per cent of the cases

decided by the Court during this decade were important enough to warrant a full bench? Surely not. Most of the Court's docket is discretionary and the criterion for granting leave is the public importance of the issues in a case. Many of the most important *Charter* cases were decided by less than the full court. Indeed, as Table 13, on majority/dissent ratios in *Charter* cases shows, participation in these cases has been basically the same as the overall pattern.

It is difficult to understand why the Supreme Court of Canada persists in its policy of rarely having the full court participate in decisions. The pressure of the Court's workload is not a very convincing argument. Even though the Court is hearing more cases, it is not being deluged by a swelling volume of leave applications, nor is it granting leave more liberally. Statistics recently released by the Court indicate that leave applications averaged 442 per year for the three years from 1988 to 1990.[5] This is a little below the volume of leave applications at the beginning of the decade.[6] Also, the percentage of cases in which leave was granted in the last three years of the decade averaged just 19 per cent—several points lower than in the early 1980s. Moreover, although the Supreme Court has been hearing more cases, the time limits introduced on oral argument should mean that it is hearing them considerably faster.

The United States Supreme Court continues to sit as a full court for all of its cases, even though it must screen (consider applications for *certiorari*) about ten times more cases than the Supreme Court of Canada, and it still manages to decide more cases on the merits each year than the Canadian Court. It is difficult to believe that the quality of its work, compared with that of the Canadian Supreme Court, suffers from this greater workload. One can only surmise that the Chief Justice and his colleagues think it does not matter very much whether the full court sits for important cases. If that is the judiciary's thinking, it should be questioned. As I have argued elsewhere, there are at least two reasons why the full court should decide important cases. The first is the need for collegiality in developing the country's jurisprudence: "[T]he decisions of a national court of appeal which are essentially legislative in character should emerge from an exchange of ideas among all of the

---

[5] *Supreme Court of Canada Bulletin: Special Edition,* 5 May 1993.

[6] See P.H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) Table 14.2 at 346.

Court's members representing all points of view and all parts of Canada."[7] The second is the danger of the perception of bias in striking panels if justices with well known ideological profiles are included or excluded. Perhaps this latter point is not so telling at the present time since, with the Laskins, Wilsons, and McIntyres gone, the Court's personnel is relatively bland and unpredictable on the big public law issues.

Table 5, the final table on the Court's overall work, shows the activity of the justices in writing judgments. An interesting point that emerges from this table is the large discrepancies in the amount of opinion writing among the justices.

TABLE 5
Action of Justices
(# Judgments/Concurrences)

Justices	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Total	% Judg.
Beetz	4	9	7	3	7	9	13	12	9		73	
	57	77	48	36	50	44	39	47	11		409	15.1
Chouinard	12	15	9	7	8	9	0				60	
	16	77	56	42	52	45	0				288	17.2
Cory									11	28	39	
									50	71	121	24.4
Dickson	15	19	23	18	20	11	19	24	19	21	189	
	80	79	46	28	42	35	39	34	53	62	498	27.4
Estey	10	24	11	13	11	9	7	10			95	
	82	74	54	37	35	23	30	8			343	21.7
Gonthier									9	9	18	
									43	99	142	11.3

[7] *Ibid.* at 350.

Justices	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	Total	% Judg.
La Forest					6	13	18	16	24	28	105	
					13	28	47	56	80	80	304	25.7
Lamer	15	13	14	10	10	15	22	27	35	38	199	
	63	71	38	31	48	40	44	55	72	60	522	27.6
Laskin	40	33	17								90	
	34	45	21								100	47.4
Le Dain				1	8	7	14	9			39	
				6	34	44	49	32			165	19.1
L'Heureux-Dubé							1	12	21	25	59	
							18	46	81	92	237	19.9
Martland	17	15									32	
	58	30									88	26.7
McIntyre	10	13	12	9	15	11	24	19	14		127	
	83	84	61	43	48	39	46	55	25		484	20.8
McLachlin									13	29	42	
									9	66	75	35.9
Ritchie	8	16	9	6							39	
	64	69	41	22							196	16.6
Sopinka								3	27	47	77	
								5	49	72	126	37.9
Stevenson										0	0	
										5	5	0
Wilson		5	10	10	15	19	25	20	35	37	176	
		21	44	35	44	36	44	58	70	66	418	29.6

The figures in the column on the far right show the frequency with which justices wrote opinions in the cases in which they took part. Thus, it gives a fair indication of relative activity regardless of the length of time served. Clearly Chief Justice Laskin was in a class by himself; writing a judgment in just under half of the cases in which he participated. After Laskin, come Justices Sopinka and McLachlin at 38 per cent and 36 per cent respectively. They are followed by a group of justices—Wilson, Lamer, Dickson, Martland, La Forest, and Cory—in the 30 per cent to 25 per cent range. Call these the "work-horses," the intellectual leaders, or the busybodies of the Court, the fact remains that these nine justices had the most direct say in shaping the Supreme Court's jurisprudence in the 1980s.

Turning now to the aggregate data on the Supreme Court's decisions involving the *Charter* during the decade, I will have less to say as the trends shown in these tables are consistent with the findings reported in our earlier analysis of the Court's first one hundred *Charter* cases. This is so despite the fact that the Journal's editors have followed different rules in counting *Charter* cases. In one sense, they have been more stringent than we were; they excluded cases concerning constitutional rights outside the *Charter* whereas we included cases dealing with Aboriginal rights, as well as minority education and language rights in the *Constitution Act, 1867*. On the other hand, the present study has been more liberal by counting as separate cases, appeals from different jurisdictions raising the same issue that were all decided by the same reasons, and by including cases that were not decided on *Charter* grounds but in which the *Charter* was "considered."

Despite these differences in counting rules, the patterns disclosed are very similar, beginning with the overall success of *Charter* claimants shown in Table 6. The editors, as we did, have counted as a "win" only those cases in which the Court found that a *Charter* right was infringed and the disposition was sought by the claimant, that is, the limit on the right was not found to be reasonable under section 1 and the evidence was excluded under section 24(2). Here we see the Court's "honeymoon period" with the *Charter* in the first two years, when it upheld two-thirds of the claims in *Charter* cases, then the slide through 1986 downwards to the much lower success rate of 26 per cent to 30 per cent that has prevailed since 1987. This lower rate is likely to be a long-term trend.

TABLE 6
Success Rates of *Charter* Claimants

Year	# of Cases	Winning %	Losing %	Other
1984	3	66.7	33.3	0
1985	12	66.7	25	8.3
1986	9	44.4	44.4	11.1
1987	26	26.9	65.4	7.7
1988	23	26.1	73.9	0
1989	36	27.8	63.9	8.3
1990	56	30.4	60.7	8.9

Table 7, on the object of litigation, shows that the target of the Supreme Court's *Charter* review is more often the executive branch of government than the legislature. I suspect that in the lower courts this trend is even more marked as many routine *Charter* cases involving the review of police activities do not reach the Supreme Court. Also, it is interesting to observe that federal legislation is reviewed much more frequently than provincial legislation. This differs from the situation in the United States where now, state legislation is most often reviewed for *Bill of Rights* infractions. However, our earlier study showed that, in terms of significant policy reversals, the provinces have lost more than the federal government through the Supreme Court's *Charter* review.[8]

[8] F.L. Morton *et al.*, *supra* note 1 at 25-26.

TABLE 7
Object of *Charter* Litigation
(Number of Cases / Per cent of Cases / Success Rate)

	Legislation				Administration			Common
Year	Fed	Prov	Terr	Mun	Dec'ns	Rules	Conduct	Law
1984	1	2						
	33.3	66.7						
	100	50						
1985	4	1					7	
	33.4	8.1					58.3	
	75	100					57	
1986	1	2					4	2
	11.1	22.2					44.4	22.2
	100	50					25	50
1987	8	5			1		12	1
	34.8	19.2			3.8		46.2	3.8
	42.9	0			0		33.3	0
1988	12	4					11	
	52.2	17.4					47.8	
	8.3	75					18.2	
1989	7	7			1	1	18	4
	19.4	19.4			2.8	2.8	50	11.1
	0	42.9			0	0	33.3	50
1990	25	6	1		3	5	28	1
	44.6	10.7	1.8		5.4	8.9	50	1.8
	20	33.3	0		33.3	0	32.1	100

Tables 8 and 8B, which indicate variations in the success of *Charter* claimants and appellants from the various sources of Supreme Court appeals, reveal an interesting similarity between *Charter* cases and the Court's overall workload.

TABLE 8

Charter Litigation by Source

(Number of Cases / Per cent of Cases / # Claimant Wins-Loses-Other)

Source	1984	1985	1986	1987	1988	1989	1990	% Claimant Wins
Alberta	1	4	2	2		7	8	50.0
	33.3	33.3	22.2	7.7		19.4	14.3	
	1-0-0	4-0-0	1-1-0	0-2-0		2-4-1	4-3-1	
British Columbia		1	2	5	6	7	11	28.1
		8.3	22.2	19.2	26.1	19.4	19.6	
		1-0-0	0-2-0	2-2-1	0-6-0	1-6-0	5-5-1	
Manitoba				2	2	2		33.3
				7.7	8.7	5.6		
				1-0-1	0-2-0	1-1-0		
New Brunswick			2					50.0
			22.2					
			1-1-0					
Newfoundland		1				1		50.0
		8.3				2.8		
		1-0-0				0-1-0		
Nova Scotia				2		1	2	40.0
				7.7		2.8	3.6	
				1-1-0		1-0-0	0-2-0	
Ontario	1	3	3	8	9	5	26	20.0
	33.3	25	33.3	30.8	39.1	13.9	46.4	
	0-1-0	0-2-1	2-0-1	1-7-0	2-7-0	2-3-0	4-20-2	

Source	1984	1985	1986	1987	1988	1989	1990	% Claimant Wins
P.E.I.				1	1			50.0
				3.8	4.3			
				1-0-0	0-1-0			
Quebec	1			2	4	8	2	52.9
	33.3			7.7	17.4	22.2	3.6	
	1-0-0			1-1-0	3-1-0	2-5-1	2-0-0	
Saskatchewan		1		2	1	3		28.6
		8.3		7.7	4.3	8.3		
		1-0-0		0-2-0	0-1-0	1-1-1		
N.W.T. & Yukon				1			2	33.3
				3.8			3.6	
				0-1-0			1-1-0	
Federal Court		2		1		2	2	14.3
		16.7		3.8		5.6	3.6	
		1-1-0		0-1-0		0-2-0	0-2-0	
Federal Ref.								0.0

TABLE 8B
Reversal Rate by Source
(# Affirmed - Reversed - Other)

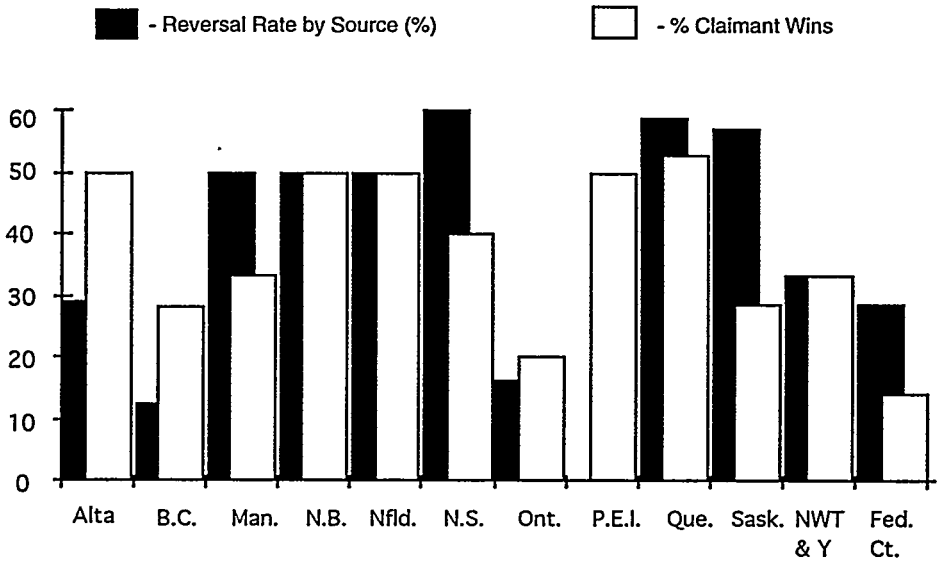
Source	1984	1985	1986	1987	1988	1989	1990	Total	%
Alberta	1-0-0	1-1-2	2-0-0	1-0-1		5-2-0	4-4-0	14-7-3	29.2
B. C.		1-0-0	2-0-0	3-1-1	6-0-0	7-0-0	7-3-1	26-4-2	12.5
Manitoba				0-2-0	2-0-0	1-1-0	1-2-1	4-5-1	50
N.B.			1-1-0					1-1-0	50
Nfld.		0-1-0				1-0-0		1-1-0	50
N.S.				1-0-1		0-1-0	0-2-0	1-3-1	60
Ontario	0-1-0	2-0-1	3-0-0	8-0-0	8-1-0	4-1-0	20-6-0	45-9-1	16.4
P.E.I.				0-0-1	1-0-0			1-0-1	0
Quebec	1-0-0			0-0-2	1-3-0	2-6-0	1-1-0	5-10-2	58.8
Sask.		1-0-0		1-1-0	0-1-0	2-1-0		4-3-0	57.1
N.W.T. & Y.				1-0-0			1-1-0	2-1-0	33.3
Fed. Court		1-1-0		1-0-0		1-1-0	2-0-0	5-2-0	28.6

As in the overall picture, *Charter* cases from Ontario and British Columbia courts of appeal are most often upheld by the Supreme Court. However, the Federal Court of Appeal, which was most frequently overruled in the aggregate, fares much better in *Charter* appeals in which it has a relatively low rate of reversal. Whatever jurisprudential differences exist between the Supreme and federal courts appear not to be operative in the *Charter* field.

What clues do these data provide in terms of ideological differences between the Supreme Court and the provincial appellate courts on *Charter* issues? Figure 1 combines reversal rates of the various sources with the success of *Charter* claimants from the various sources of *Charter* appeals. There does not appear to be any marked correlation between reversal rates and the *direction* of *Charter* outcomes. Look, for

instance, at Nova Scotia, Quebec, and Saskatchewan, the provinces with the three highest reversal rates.

FIGURE 1
Reversal Rate & % of Claimant Wins



The success of *Charter* claimants in appeals from these provinces varies considerably: quite high for Quebec, moderate for Nova Scotia, and low for Saskatchewan. Unlike our analysis of this aspect of the first hundred *Charter* cases, the data shown here on claimant wins are for wins in all appeals from each source, not just appeals in which the Supreme Court reversed the lower court. However, our analysis showed that, even when the focus is entirely on *Charter* wins in successful appeals, no clear ideological direction can be discerned.[9] It may be that the ideological factor at work in these *Charter* case is the Court's middle-of-the-road position on the *Charter.* This results in higher reversal rates of lower courts that are more markedly "conservative" on the *Charter* (for example, the Nova Scotia and Quebec Courts of Appeal) or more markedly "liberal" (like the Saskatchewan Court of Appeal). However,

[9] *Ibid.* at 19.

in order to confirm this possibility, more detailed analysis is needed.

TABLE 9
Subject of *Charter* Litigation
(# of Claimant Wins - # of Cases)

Year	Fundamental Freedoms	Democratic Rights	Mobility Rights	Section 7	Legal Rights (7 - 14)	Equality Rights	Other Rights
1984			0-1		1-1		1-1
1985	2-2			2-5	6-10		0-2
1986	1-3			0-2	3-7		0-3
1987	0-4			3-9	10-32	0-1	0-4
1988	2-3			2-6	3-28	0-1	3-5
1989	1-6		1-2	0-7	7-26	2-5	2-7
1990	1-8			8-24	23-65	2-13	3-7
Total	7-26		1-3	15-53	53-169	4-20	9-29
% Wins	26.9		33.3	28.3	31.0	20.0	31.0

Anyone knowledgeable about *Charter* cases will not be surprised by the data on the subject of *Charter* litigation as shown in Table 9. Clearly, the overwhelming proportion of Supreme Court cases dealing with the *Charter*, in purely quantitative terms, consider the legal rights sections and section 7. But here is a point where a qualitative analysis would give quite a different picture because arguably the decisions the Court has rendered on other categories of rights, especially fundamental freedoms and equality rights, have been at least as important as the great mass of its decisions in legal rights cases. As for the success of *Charter* claimants in the various categories of *Charter* cases, the one point that stands out is the relative paucity of successes in cases raising equality rights issues. This too will come as no great surprise to those who expected a great deal more from section 15.

Several times in this commentary I have referred to the relatively

middle-of-the-road position, which has come to characterize the Supreme Court's approach to the *Charter*. The consolidated tables on the participation of justices in these first seven years of *Charter* cases provide some evidence of this tendency.

TABLE 10
Action of the Judges
(# Judgments Written for the: Court - Majority - Dissent)

Justices	1984	1985	1986	1987	1988	1989	1990	Total	% Diss.
Beetz	0-0-0	0-1-0	0-3-0	1-2-0	0-3-0	0-1-1		1-10-1	8.3
Chouinard	0-0-0	0-0-0	0-0-0					0-0-0	0
Cory						1-1-0	3-9-6	4-10-6	30.0
Dickson	1-0-0	0-2-0	0-3-0	1-1-2	1-7-2	3-1-0	6-7-2	12-21-6	15.4
Estey	1-0-0	0-2-0	0-1-0	0-1-2	0-0-0			1-4-2	28.6
Gonthier						0-1-0	0-2-0	0-3-0	0
La Forest		1-1-0	0-3-0	0-9-0	2-3-1	1-5-2	0-13-3	4-34-6	13.6
Lamer	0-0-0	0-3-0	0-2-1	4-8-3	3-2-2	5-5-2	1-19-1	13-39-9	14.8
Le Dain		1-1-0	0-0-0	0-6-0	3-1-0			4-8-0	0
L'Heureux-Dubé				0-0-0	0-2-0	0-2-2	0-9-6	0-13-8	38.1
McIntyre	0-0-0	1-1-2	0-5-0	0-5-3	0-5-2	3-2-3		4-18-10	31.3
McLachlin						0-0-0	1-6-9	1-6-9	56.3
Ritchie	0-0-0							0-0-0	0
Sopinka						5-2-2	0-26-4	5-28-6	15.4
Wilson	0-0-0	0-4-0	0-4-2	1-9-4	0-5-1	2-4-4	0-7-11	3-33-22	37.9

In Table 10, Action of the Judges, we can see that the bulk of the Court's *Charter* jurisprudence has come from the pens of a small number of judges. Three-quarters of the Court's *Charter* judgments have been written by six of its members: Lamer (61), Wilson (58), La Forest (44), Dickson (39), McIntyre (32), and Sopinka (29). Two of these six, McIntyre and Wilson, wrote more than twice as often in dissent than the other four. The reason for this is evident when we examine the data on the direction of the justices' voting in *Charter* cases shown in Table 11.

TABLE 11
Voting Behaviour of Justices
(Support for: Claimant - Government - Other)

Justices	1984	1985	1986	1987	1988	1989	1990	Total	% Support For Claimant
Beetz	2-1-0	6-2-1	2-4-1	5-13-1	5-13-0	4-2-1		24-35-4	38.1
Chouinard	1-0-0	7-3-1	3-3-1					11-6-2	57.9
Cory						4-12-1	15-19-2	20-31-3	37.0
Dickson	2-1-0	8-3-1	4-3-0	9-14-1	5-16-0	8-16-3	13-31-2	49-84-7	35.0
Estey	2-1-0	4-3-2	3-3-0	5-8-0	1-3-0			14-18-2	41.2
Gonthier						3-10-1	15-30-2	18-40-3	29.5
La Forest		0-1-1	3-2-1	7-15-2	3-16-0	9-20-3	19-27-0	41-81-7	31.8
Lamer	2-1-0	8-3-1	4-3-0	9-10-5	9-11-0	10-21-3	15-26-2	57-75-11	39.9
Le Dain		4-3-0	3-4-0	7-11-2	1-7-0			15-24-25	23.4
L'Heureux-Dubé				0-2-0	2-9-0	6-24-2	18-30-0	26-65-2	28.0
McIntyre	2-1-0	5-5-2	4-3-1	4-19-2	3-18-0	3-9-1		21-55-6	25.6
McLachlin						2-3-1	12-19-0	14-22-1	37.8
Ritchie	2-1-0							2-1-0	66.7
Sopinka						8-11-3	19-31-2	27-42-5	36.5
Wilson	2-1-0	8-2-1	5-4-0	12-12-1	7-11-0	12-17-3	28-18-2	74-65-7	50.7

Of the six largest producers of *Charter* jurisprudence, McIntyre was the least pro-claimant and Wilson, the most pro-claimant. These justices, who were ideologically at the opposite edges of the Court on *Charter* issues, are gone, and have been replaced by justices with a less discernible orientation.

Of the more recently appointed justices who have written a substantial number of judgments in *Charter* cases, Madame Justice McLachlin has been the marked dissenter with over half of her judgments in dissent. But her general orientation regarding the *Charter* as measured by her votes in *Charter* cases, is mostly in the middle of the Court. Indeed, an interesting feature of the data on judgment writing is that the three women members of the Court wrote frequently in dissent. This indicates, perhaps, not so much a common ideological disposition as a remarkable independence of mind.

The Journal's study has also garnered statistical data on the different categories of litigants and their relative success in *Charter* cases. The consolidation of these data as shown in Table 12 illustrates two interesting points. The first is that business corporations, despite participating relatively infrequently in *Charter* litigation at the Supreme Court level, are clearly the most successful type of litigant. The second point is that on the few occasions (only 5) when interveners have been entirely on the claimant's side they have done extremely well—indeed, they have never lost! Both points should be followed up by more detailed studies. Empirical work on the use of *Charter* litigation by interest groups and governments is under-developed in Canada.[10]

---

[10] For a pioneering work in this area, see I. Brodie, "Interest Groups in Court: Beyond the Political Disadvantage Theory" (Paper presented at the 1992 Annual Meeting of the American Political Science Association, 3-6 September 1992) [forthcoming in the American Political Science Review].

TABLE 12
Types of *Charter* Claimants and Interveners
(# of Cases / Per cent of Cases / # Claimant: Wins-Loses-Other)

	1984	1985	1986	1987	1988	1989	1990	Total
Business	1	2	1	1	3	5	5	18
Corporations	33	17	11	4	13	14	9	
	1-0-0	2-0-0	1-0-0	0-0-1	2-1-0	1-4-0	0-5-0	7-10-1
Individuals	1	8	6	22	20	31	52	140
	33	67	67	85	83	86	93	
	0-1-0	5-2-1	3-2-1	7-14-2	5-15-0	8-19-3	15-32-5	43-85-12
Interest		1	1	1			1	4
Groups		8	11	4			2	
		0-1-0	0-1-0	0-1-0			1-0-0	1-3-0
Unions		1	1	3	1		2	8
		8	11	12	4		4	
		0-1-0	0-1-0	0-3-0	0-1-0		1-1-0	1-7-0
Other	1	1						2
	33	8						
	1-0-0	1-0-0						2-0-0
Interveners:								
Cases for Clmt	1	1			3			5
# Clmt Wins	1	1			3			5
Cases for Gov't		3	5	7	14	11	34	74
# Gov't Wins		1	3	5	3	8	25	45
Cases for Both	1	1		6		5	4	17
# Clmt Wins		1				1	2	4

I have already commented on the data shown in Table 13 on the majority/dissent ratio in *Charter* cases. Here we can see that all but a handful of *Charter* cases during this formative period were decided by panels of five or seven judges, and that, as the Court came to deal more frequently with the *Charter,* it became much more divided.

TABLE 13
Majority/Dissent Ratio in Charter Cases

Decisions	1984	1985	1986	1987	1988	1989	1990	Total
Unanimous	3	10	6	15	16	23	26	99
Split	0	2	3	11	7	13	30	66
% Freq. of Unanimous	100	83.3	66.7	57.7	69.6	63.9	46.4	60.0
Full Panels (9 & 8 Justices)								
9:0		1	1			5	4	11
8.1								
7:2							1	1
6:3							1	1
5:4							1	1
8:0	1	2		3				6
7:1				1				1
6:2		1						
5:3					1			1
4:4								
Subtotal	1	4	1	4	1	5	7	22
% Freq.	33.3	33.3	11.1	15.4	4.3	13.9	12.5	13.3

Decisions	1984	1985	1986	1987	1988	1989	1990	Total
Medium Panels (7 & 6 Justices)								
7:0	2	3	5	8	8	10	23	59
6:1		1	2	3		1	4	11
5:2				2	1	2	5	10
4:3			1			2	8	11
6:0		4		2	3	1		10
5:1				3	2	1		6
4:2				2	1	3	4	10
3:3								
Subtotal	2	8	8	20	15	20	44	117
% Freq.	66.7	66.7	88.9	76.9	65.2	55.5	78.6	70.9
Small Panels (5 & 4 Justices)								
5:0				2	5	7	2	16
4:1						1		1
3:2					1	3	3	7
4:0								
3:1					1			1
2:2								
Subtotal				2	7	11	5	25
% Freq.				7.7	30.4	30.6	8.9	15.2
3:0								
2:1								
1:0								

Full Panels (9 & 8)	Unanimous Decisions = 17 Split Decisions = 5
	% Frequency of Unanimous Decisions = 77.3
Medium Panels (7 & 6)	Unanimous Decisions = 69 Split Decisions = 48
	% Frequency of Unanimous Decisions = 59.0
Small Panels (5 & 4)	Unanimous Decisions = 16 Split Decisions = 9
	% Frequency of Unanimous Decisions = 64.0

Finally, Table 14 on the Court's treatment of the exclusion of evidence under the *Charter*'s section 24(2), provides one clue to the divisiveness of *Charter* decision making. As we argued in our analysis of the Court's first hundred *Charter* decisions, section 1 and section 24(2) of the *Charter* are highly judgmental in nature, requiring determinations that are not readily settled by established precedents.[11]

TABLE 14
Legal Rights and Section 24(2)

	1984	1985	1986	1987	1988	1989	1990	Total
Section 24(2) Used		3	1	5	5	8	10	32
Evidence Excluded		3	1	3	1	4	6	18
Evidence Admitted				2	4	3	4	13
Other						1		1

Thus, in Table 14 we see that over the last four years of the decade, the results of section 24(2) arguments before the Court were evenly divided between exclusion and admission of evidence. It would be interesting to have data on the rate of dissent in these cases, as well as on cases whose outcome turned on a section 1 ruling. But the problem with judicial statistics is that a little is apt to wet one's appetite for more!

[11] *Supra* note 1 at 36.