The Supreme Court of Canada in 1999: The year in review

BY PATRICK J. MONAHAN

Patrick Monahan is professor of law and director of the Centre for Public Law and Public Policy at Osgoode Hall Law School, York University.

In the 1999 calendar year, the Supreme Court of Canada handed down 18 constitutional cases, down slightly from 21 constitutional decisions in 1998 and 22 in 1997. But, overall, the output of the court in 1999 was significantly lower than in previous years, with the court handing down a total of just 73 decisions. This represents a drop from the established pattern in the 1990s—a period during which the court tended to decide over 100 cases annually (including 124 decisions in 1996 and 150 in 1993). In 1999, about one of every four decisions was decided on constitutional grounds (including Charter, division or powers, and aboriginal issues).

Not only was output down in 1999, but the court sat for just 55 days during the year, which is significantly lower than the average of 75 sitting days over the 1995–98 period. The period between filing an application for leave to appeal and the decision on leave also increased to 5.2 months (up from 3.9 months in 1998), and the period between the hearing of an appeal and judgment increased to 5.4 months (almost double the 2.8 months achieved in 1998 and 1997).

There is no obvious explanation for this decline in output and workload in 1999. One possibility is that the retirements of Chief Justice Lamer and Justice Cory somehow left the court shorthanded for part of the year. On the other hand, the transition to the new appointees, Justices Arbour from Ontario and Lebel from Quebec, appeared (to outside observers at least) to be fairly smooth and seamless. It will be interesting to track these output and workload figures for the 2000 year to see whether the numbers move back up to the levels achieved in earlier years.

It continues to be very difficult to obtain leave to appeal to the highest court, with just 12 percent of applicants for leave being successful in 1999. Also noteworthy is that the court received about 20 percent fewer applications for leave in 1999 as compared with 1998 (458 versus 572), which means that although the percentage of successful applicants remained relatively constant last year, the absolute number of successful leave applications was significantly lower.

CONSTITUTIONAL CASES

Of the 18 constitutional cases in 1999, 14 were Charter cases, 2 were federalism cases, and 2 were aboriginal rights cases. The claimants succeeded in their claims against government in 5 of the 14 Charter cases in 1999, a "success rate" of 36 percent. This is consistent with the established pattern that we have tracked in recent years, with about one in every three Charter cases decided by the Su-

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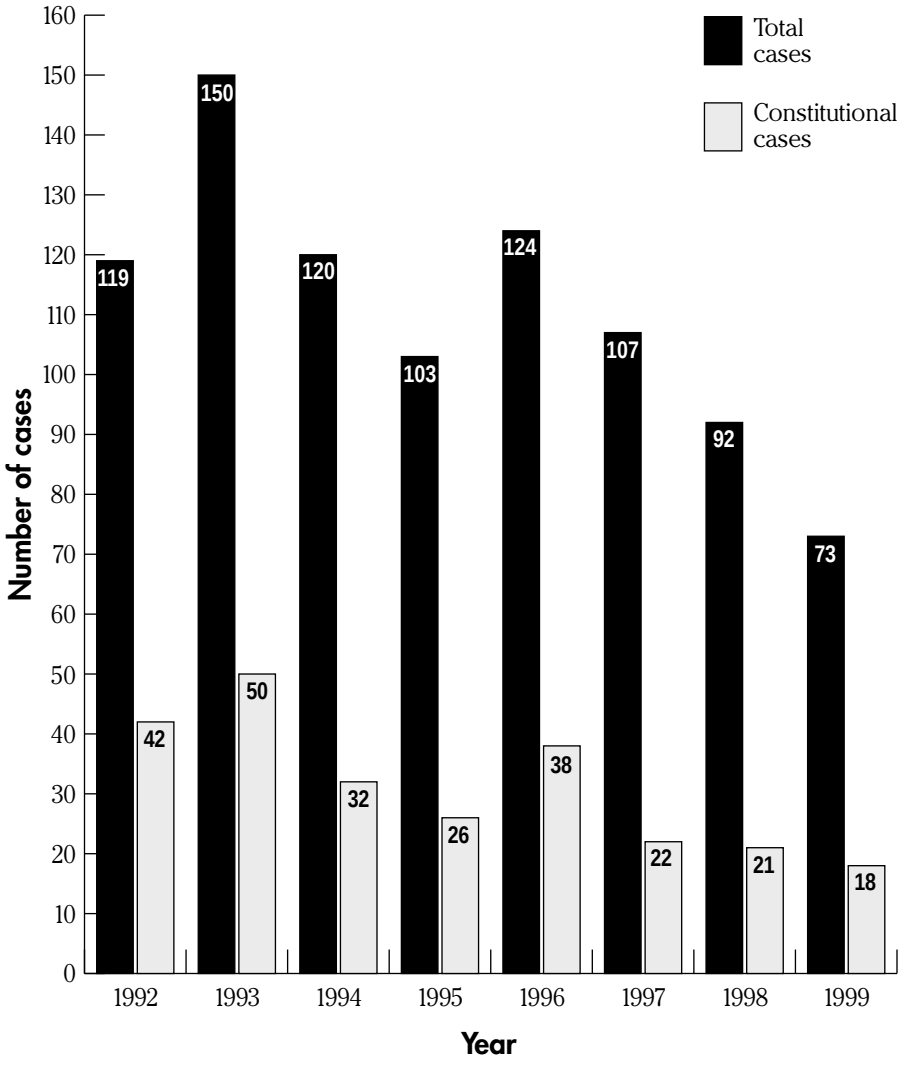
FIGURE 1 CASELOAD 1992–1999



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preme Court resulting in a "win" for the individual claimant. In the two federalism cases, success was divided: the federal government succeeded in the *M & D Farms* case and the provinces were successful in the *Westbank First Nation* case. The two aboriginal claimants were both successful (in *Sundown* and *Marshall*), although the court in *Marshall* later attempted to narrow the implications of its reasoning when it dismissed an application for a rehearing by one of the intervenors.

In *Law* the court attempted to consolidate the disparate strands of analysis that had emerged in the mid-1990s in relation to the meaning of s. 15 of the *Charter*. The court put forward a complicated and multi-layered test that seems to turn on whether a particular distinction amounts to a denial of a claimant's human dignity.

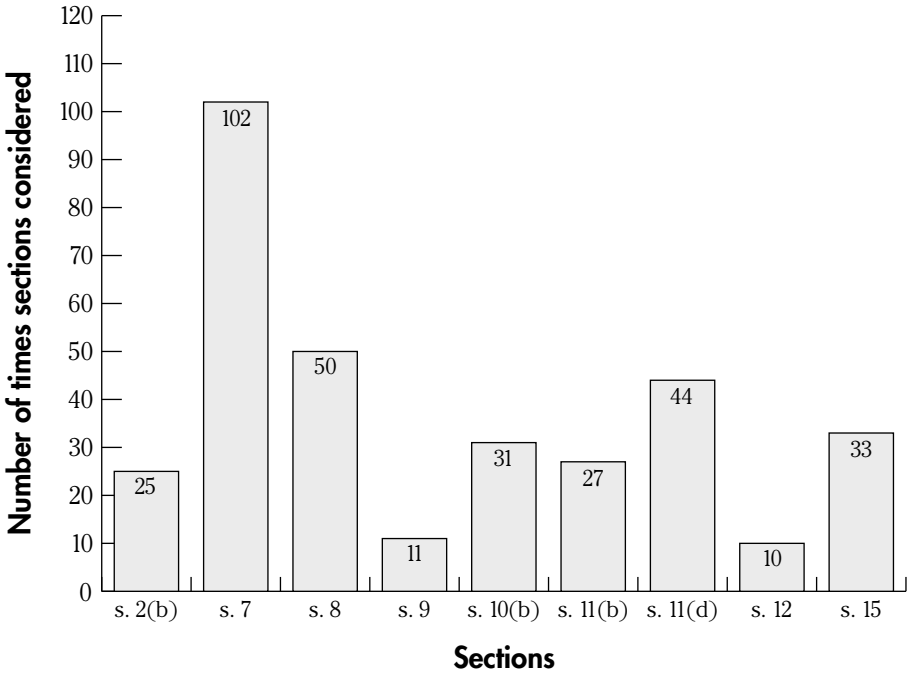
KEY DECISIONS IN 1999

Of the 1999 constitutional cases, the equality rights decision in *Law* appeared to be the most significant in broader jurisprudential terms. In *Law* the court attempted to consolidate the disparate strands of analysis that had emerged in the mid-1990s in relation to the meaning of s. 15 of the *Charter*. The court put forward a complicated and multi-layered test that seems to turn on whether a particular distinction amounts to a denial of a claimant's human dignity. As Chris Bredt notes elsewhere in this issue, the question whether a legal distinction violates human dignity is an extremely indeterminate criterion that lower courts will have considerable difficulty in applying in the future.

The puzzle is why the court continues to regard it as so important to dismiss cases at the s. 15 stage, rather than let the claim through to s. 1 where the *Oakes* test could be applied in the normal fashion. The *Oakes* test has proven itself flexible and adaptable to a wide variety of contexts in recent years. It thus seems difficult to understand why it should be made so difficult for a claimant in a s. 15 case to get through to s. 1. Significantly, of the 33 equality rights cases decided by the Supreme Court in the 1990s, s. 1 was determinative in just one instance—the 1995 decision in *Egan*. In the other 32 cases, the claim was either dismissed at the s. 15 stage or, if the claimant succeeded in establishing a s. 15 violation, the Charter claim succeeded at the s. 1 stage. This pattern seems the natural consequence of the Court's s. 15 jurisprudence, which in effect substitutes the "dignity" analysis developed under s. 15 in place of the *Oakes* s. 1 test. (Note, however, that the court has been relatively receptive to s. 15 claims overall, with about one in three such claims succeeding. The point is that the s. 1 *Oakes* test almost never proves determinative in the outcome.)

In previous years we have noted that Charter claims were more likely to succeed in criminal cases than in non-criminal cases. That trend was reversed in 1999, where just one of the six criminal law Charter claimants was successful, while four of the eight non-criminal claimants succeeded. Over the entire decade, however, claims in the criminal law context have resulted in the greatest success at the Supreme Court level. For

FIGURE 2 FREQUENCY OF CHARTER CLAIMS BY CHARTER SECTION



example, claims based on s. 11(d) (the presumption of innocence and guarantee of trial by an independent tribunal) succeeded in nearly one out of every two cases in which they were raised over the decade. This is followed by claims based on s. 15 (with a 33 percent success rate), and s. 10(b) (right to counsel, with a 32 percent success rate). At the other end of the scale, claims based on s. 12 (cruel and unusual punishment) were rejected in each of the 10 cases in which such claims were raised.

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CHARTER ACTIVISM

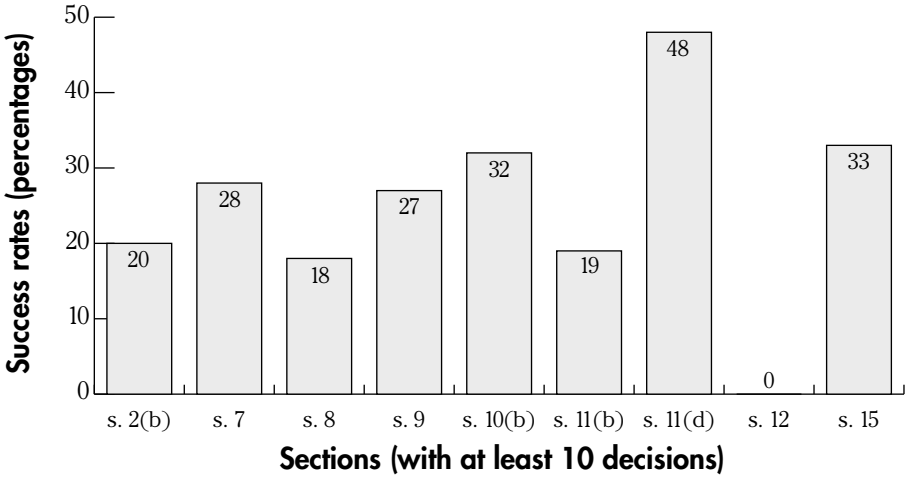
The debate over judicial activism has gained additional momentum over the past year, as the contributions by Peter Hogg, Guy Giorno, and Ted Morton underline. But regardless of one's views on the relative merits of the different positions in the debate, the fact remains that the Supreme Court itself is divided over the extent to which it is appropriate to use the Charter to overturn the decisions of legislatures and public officials. The most "activist" member of the court over the past decade has been Justice John Major from Alberta, who has favoured the Charter claimant in 42 percent of the Charter cases in which he has participated. Relative newcomer Justice Ian Binnie has also favoured the claimant in 42 percent of cases (albeit having sat on far fewer cases than Justice Major). In contrast, the new Chief Justice, Beverley McLachlin, has favoured the Charter claimant in 27 percent of cases in which she has participated. Quebec Justices L'Heureux-Dubé and Gonthier are least likely to rule in favour of the Charter claimant (each with a 20 percent success rate in the 1990s), although it should be noted that Justice L'Heureux-Dubé is very receptive to s. 15 claims and much less receptive to other kinds of Charter arguments.

THE ROLE OF INTERVENORS

Over half of the constitutional cases before the Supreme Court now feature the participation of "intervenors"—persons or groups that are not parties to the case itself but are given the right to file written materials and sometimes make oral arguments. This is in stark contrast to the situation as recently as the late 1980s, when the Supreme Court was criticized for being overly restrictive in granting third parties the right to make submissions.

As might be expected given their automatic right to intervene in constitutional cases, the most frequent intervenors are governments, with slightly less than one-half (168) the total 354 interventions over the past four years having been by governments. Significantly, the most frequent government intervenor before the Supreme Court during this period has been the Attorney General of Quebec, which intervened in 28 cases over the past four years. This was followed by the government of Canada (25 interventions), British Columbia (24), and Alberta (21). Ontario intervened 19 times in the past four years. The fact that Quebec was the most frequent government intervenor is surprising since there tend to be fewer constitutional cases at the Supreme Court level from the province of Quebec than from either of Ontario or British Columbia. One might have expected the most frequent provincial government intervenor to have been one of these two provinces, rather than Quebec. The four Atlantic provinces, Prince Edward Island (3), Newfoundland (2), Nova Scotia (3), and New Brunswick (3), are the least likely to intervene in constitutional cases before the Supreme Court. These provinces also tend to have relatively fewer constitutional cases heard by the Supreme Court.

FIGURE 3 CHARTER SUCCESS RATE BY CHARTER SECTION



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Apart from governments, the largest single group of intervenors are non-profit organizations, including registered charities, law-related organizations, industry associations, and other non-profits. A total of 76 different non-profit organizations intervened before the Supreme Court during the last four years, including 27 registered charities, 14 law-related organizations (such as the Canadian Bar Association and the Criminal Lawyers Association), and 5 industry groups (such as the Canadian Manufacturers' Association and the Retail Council of Canada). There were 19 aboriginal organizations, 3 trade unions, 5 corporations, and 11 individuals who also intervened over the past four years.

Among non-profit organizations, registered charities have been the most frequent intervenors in constitutional cases, with 27 charitable organizations making a total of 41 appearances. This is followed by law-related groups (23 times) and individuals (17 times). The 19 aboriginal organizations have appeared 28 times over the past four years. Corporations and trade unions rarely intervene in constitutional cases.

The relevant numbers are set out in tables 1 and 2.

Certain organizations tend to intervene more frequently than others. The most frequent non-governmental intervenor during this period was the Canadian Civil Liberties Association (CCLA), which intervened eight times. Moreover, in all eight instances, the CCLA intervened in support of the Charter claimant. This was followed by the Women's Legal Education and Action Fund (LEAF), the BC Fisheries Survival Council, the BC Wildlife Federation, and Delgamuukw et al., each of whom intervened five times. However, these intervenors (unlike the CCLA) did not always intervene in support of the individual claimant, but sometimes intervened to uphold the legislation or government action that was under scrutiny. (It should also be noted that the BC Fisheries Survival Council, the BC Wildlife Federation, and Delgamuukw all intervened in a series of aboriginal rights cases in 1996, but have not intervened in any other year or in any other context.) Only one trade union organization (the Canadian Labour Congress) and one private corporation (Canadian National Railway Company) intervened three or more times in the Supreme Court.

The fact that Quebec was the most frequent government intervenor is surprising since there tend to be fewer constitutional cases at the Supreme Court level from the province of Quebec than from either of Ontario or British Columbia.

In 1999, at least, government intervenors were more successful than non-government ones. The Centre for Public Law and Public Policy contacted all of the intervenors who appeared in 1999 in an attempt to ascertain whether or not their intervention was successful. (Success is defined here in terms of supporting the party that eventually prevailed in the litigation.) The 29 interventions by attorneys general that we reviewed resulted in a successful intervention in 21 instances. In contrast, in the 53 interventions by non-governmen-

TABLE 1 APPEARANCES BY PUBLIC INTEREST ORGANIZATIONS, 1996–1999

Year	Registered charities	Law-related organizations	Industry groups	Misc. non-profit organizations	Total appearances
1996	0	1	4	17	22
1997	18	10	1	10	39
1998	9	8	0	12	29
1999	14	4	4	15	37
Total	41	23	9	54	127

TABLE 2 APPEARANCES BY OTHER ENTITIES, 1996–1999

Year	Trade unions	Corporations	Aboriginal organizations	Individuals	Total appearances by year
1996	0	3	14	12	29
1997	0	3	3	0	6
1998	1	0	4	4	9
1999	5	2	7	1	15
Total	6	8	28	17	59

tal entities that we reviewed in 1999, the intervention was successful in 28 cases.

These data are relevant to the continuing debate over the role of the courts in constitutional litigation. In the early years of the Charter, certain Charter critics argued that only profitable corporations and wealthy private individuals would have the resources necessary to fund expensive litigation all the way to the Supreme Court level. Partly in response to these fears, the government of Canada instituted a Court Challenges Program, designed to fund litigation in language rights and equality rights cases. The theory of the Court Challenges Program is that, by providing funding to groups or interests that would not otherwise have the resources to undertake litigation, such groups will have the opportunity to use constitutional rights to advance their interests before the courts. Although the Court Challenges Program was cancelled in the early 1990s, it was reinstated following the 1993 federal election and currently funds litigation in language rights and equality rights cases.

We have not attempted to ascertain how many of the intervenors in the cases examined received funding directly or indirectly (either in the form of grants or other subsidies). (It should also be remembered that our study examined only the intervenors, not the principal parties in the litigation.) Nevertheless, these data suggest that non-traditional interests, particularly charities, aboriginal groups, and non-profit organizations, have effectively seized the opportunity to intervene in litigation before the Supreme Court. In this sense, the fears that the Charter would be used unduly by profitable corporations or the wealthy to reinforce their pre-existing privilege do not seem to be borne out by these statistics.

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BALANCING THE ROLES OF INTERVENORS AND PARTIES

There is a strong tendency to have multiple intervenors in a single proceeding. In those cases where intervenors appear at all, there is an average of almost six intervenors in a single proceeding. Moreover, in these cases one typically finds that there are intervenors on both sides of the issue. For example, in the recent *Mills* case (*R. v. Mills* (1999)) dealing with the right of an accused person to obtain psychiatric records of a complainant in a sexual assault case, there were a total of 18 intervenors, including 8 attorneys general and 10 non-governmental bodies or persons. Although it is not clear from the court's opinion precisely what position was taken by all the intervenors, most of them appear to have intervened in support of the constitutionality of the legislation and against the position taken by the accused, whose liberty was at stake in the proceeding.

Before 1987, it was generally not possible to intervene in a criminal case, with the court taking the position that criminal cases involve only the citizen and the state rather than third parties. Now, however, interventions are commonly granted in criminal matters. For example, there were intervenors in 28 of the 70 criminal law constitutional cases decided over the past 4 years (approximately 40 percent.) Although this level of intervention is lower than for non-constitutional cases, it nevertheless raises some concerns about the appropriateness of the court's current practice, since an individual accused may be forced to confront not only the Crown but also an array of other groups and organizations. Moreover, these other organizations will typically be far better funded that the individual accused and, indeed, may be governments or other organizations that are funded partly or wholly through grants, subsidies, or the tax system.

The Supreme Court announced in August 1999 that, in future, it would strictly enforce the 60-day time limit for filing of applications for intervention. (See the Notice to the Profession, discussed in Crane and Brown, *Supreme Court of Canada Practice* (Carswell, 2000), at 200.) The court also announced that intervenors should not assume that they will be granted the right to make oral submissions to the court. Anecdotal reports from applicants for intervenor status suggest that the court is now taking a much more restrictive view of the right of intervenors to make oral argument.

A somewhat more rigorous enforcement of the requirements of the Supreme Court Rules seems appropriate, particularly in the criminal law context. Moreover, while the court clearly has an interest in obtaining all relevant information and viewpoints on important issues of public policy, there does not seem to be any reason in principle why such information need be provided by way of oral argument. Granting intervenors the right to make written submissions alone seems to strike an appropriate balance between the need to obtain relevant information and viewpoints on the one hand and the fact that the actual parties to the litigation, whose interests are most directly at stake, should be the primary focus of the actual oral argument before the court on the other.