THE SUPREME COURT OF CANADA'S 1997 CONSTITUTIONAL DECISIONS: A STATISTICAL OVERVIEW[1]

BY PATRICK J. MONAHAN

In last year's *Canada Watch* analysis of the Supreme Court of Canada's constitutional cases, we raised the question of whether the Court was about to commence a retreat from its previous activism in *Charter of Rights* cases.[2] We raised this issue in light of the fact that *Charter* claimants succeeded in only about 10% of the *Charter* decisions handed down by the Court in 1996, the lowest "success rate" for *Charter* claimants this decade.[3]

The Court's 1997 constitutional decisions[4] indicate the folly of attempting to deduce any long-term trends based on a single year's results. In the 20 *Charter* decisions rendered by the Court in 1997, the *Charter* claimant succeeded in 10 cases, for a 50% success rate. While the results in particular years tend to fluctuate due to the small number of cases decided in a single year (i.e., success rate down in 1996, up in 1997), overall the Court appears to have established a fairly steady approach to its interpretation of the *Charter*; *Charter* claimants tend to succeed, on average, in close to one-third of cases. Thus, of the 230 *Charter* decisions handed down by the Court over the past seven years, the *Charter* claimant succeeded in 73 cases, a 31.74% success rate (see TABLE 1, SUCCESS RATE IN *CHARTER* CASES, 1991-97).

[W]hile the success rate for Charter *claimants who actually reach the Court is fairly constant over time, the Court has had to become more selective in the cases it decides to hear.*

While the success rate in the Court's *Charter* decisions appears to have found its overall equilibrium at approximately the one-third mark, it should be noted that it is becoming more difficult to obtain leave to appeal to the country's highest tribunal. Over the past decade, the Court has granted leave to appeal in anywhere from 65 to 85 cases annually. However, over that same period, the number of leave applications has increased by nearly 60%, which translates into a steadily decreasing percentage of leave to appeal applications being granted (see TABLE 2, APPLICATIONS FOR LEAVE; note that the numbers in this table include all cases appealed to the Court, not just constitutional or *Charter* cases). In this sense, while the success rate for *Charter* claimants who actually reach the Court is fairly constant over time, the Court has had to become more selective in the cases it decides to hear.

In assessing these numbers, it is important to remember that about one-third of the Supreme Court's docket in recent years has been composed of cases in which there was an automatic right of appeal, mostly in criminal cases where an acquittal had been set aside in a court of appeal. In April 1997, Parliament amended the *Criminal Code* to narrow slightly the circumstances in which such an automatic right of appeal would apply. Last year, there were 34 notices of appeal as of right filed with the Court, the lowest number this decade.[5] It is unclear whether the lower number of appeals as of right filed in 1997 is a reflection of the impact of the *Criminal Code* amendment. If, indeed, the number of appeals as of right falls to about 30 per year as opposed to the average of 50 filed over the previous four years, more room would be freed up on the Court's docket for the hearing of cases in which leave is granted.

What kinds of *Charter* claims are more likely to succeed at the Supreme Court level? As we noted in last year's analysis, the four most frequently litigated *Charter* provisions at the Supreme Court level are section 7 ("principles of fundamental justice"), section 8 ("search and seizure"), section 10(b) ("right to counsel") and section 11(b) (right to "independent and impartial tribunal"). Of these "big four" provisions, the Court has generally been most receptive to claims based on section 11(d), the guarantee that persons charged with an offence have the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Over the past seven years, the Court has ruled in favour of the *Charter* claimant in about one of every two

Key Findings

- One-quarter of the Court's 1997 decisions were constitutional cases
- Overall success rate for *Charter* claims over the past 7 years is 31%
- It is significantly more difficult to obtain leave to appeal to the Supreme Court today than it was a decade ago
- The number of appeals as of right filed last year was the lowest this decade
- Most successful *Charter* claim is right to be tried within reasonable time by an independent and impartial tribunal
- The Court has been more receptive to equality rights claims in the past few years
- Chief Justice Lamer and Justice Major are the justices more likely to side with *Charter* claimants, while Madame Justice L'Heureux-Dubé and Justice Gonthier are most likely to side with government
- The Court is more likely to strike down federal legislation than provincial legislation

TABLE 1: Success Rate in Charter Cases, 1991-97

	CHARTER CHALLENGES	INFRINGEMENT FOUND	SUCCESS RATE
1991	35	15	42.86%
1992	38	12	31.58%
1993	42	9	21.43%
1994	26	11	42.31%
1995	33	8	24.24%
1996	35	8	22.87%
1997	20	10	50%
TOTAL	230	73	31.74%

cases in which section 11(d) claims have been raised (see TABLE 3, SUCCESS RATE OF CONSTITUTIONAL CHALLENGES BY *CHARTER* SECTION, 1991-97). This predisposition in favour of section 11(d) claims was reflected this past year in the Court's ruling that the attempt by some provinces to roll back provincial court judicial salaries was an unconstitutional infringement of the independence of the judiciary. This controversial decision has attracted considerable commentary from the contributors to this special issue of *Canada Watch*, including the articles by Peter Russell and Jamie Cameron.

The second most successful kind of *Charter* claim over the past seven years has been section 10(b), the "right to counsel", where claimants succeed in slightly more than one out of every three cases. Somewhat surprisingly, given earlier trends in the jurisprudence, the Court has been rather less receptive to claims based on "unreasonable search and seizure" under section 8; while the Court finds a breach of section 8 rights in close to one-half of the cases in which such claims are made, in over half of those instances it goes on to find that evidence obtained from such an unlawful search ought nevertheless to be admitted into evidence. At the end of the day, therefore, claimants raising section 8 rights succeed in obtaining a remedy in only about one out of five cases decided by the Court. (On the other hand, it should be noted that a finding that a particular kind of search is "unreasonable" is significant—regardless of whether the evidence actually obtained is excluded—since this restricts the manner in which law enforcement authorities can conduct searches in the future. In this sense, even though section 8 litigants may

continued on page 104

TABLE 2: Applications for Leave

YEAR	NUMBER HEARD BY OR SUBMITTED TO THE COURT	NUMBER GRANTED (PENDING)	PERCENTAGE GRANTED
1991	480	83	17
1992	460	77	17
1993	513	84	16
1994	496	77	16
1995	445	67	15
1996	573	67	12
1997	615	62 (44)	10

TABLE 3: Success Rate of Constitutional Challenges by Charter Section, 1991-97

CHARTER SECTION	NUMBER OF CHALLENGES	INFRINGEMENTS FOUND	INFRINGEMENTS SAVED UNDER S. 1	REMEDY NOT GRANTED UNDER SS. 24(2) OR 24(1)	SUCCESS RATE
2(a)	7	1	1	—	—
2(b)	19	8	3	—	26.3%
2(d)	3	1	—	—	—
3	4	2	—	—	—
4	1	1	—	—	—
6	3	—	—	—	—
7	84	25	1	—	28.6%
8	44	21	—	12	20.5%
9	11	3	—	—	27.3%
10(a)	3	2	—	1	—
10(b)	29	13	—	3	34.5%
11(a)	3	—	—	—	—
11(b)	24	4	—	—	16.7%
11(c)	2	—	—	—	—
11(d)	38	21	2	1	47%
11(e)	2	—	—	—	—
11(f)	1	—	—	—	—
11(g)	4	—	—	—	—
12	10	2	—	2	—
13	2	—	—	—	—
14	1	1	—	—	—
15	24	9	1	1	29%
23	1	1	—	—	—
28	1	—	—	—	—
32	5	1	—	—	—
TOTAL	326				

not benefit personally, the reasoning employed by the Court will prove of value to potential litigants in the future.)

[W]here the Court finds a section 15 violation, it is extremely unlikely that it will uphold that infringement as a reasonable limit under section 1.

One significant surprise, given earlier commentary suggesting the Court's lack of receptiveness to equality rights claims, is the relative success of claims based on section 15, the equality guarantee. As Table 3 indicates, over the past seven years section 15 claims have succeeded in one-third of the cases in which they have been the subject of a Court decision. Moreover, of the nine instances in which the Court found a violation of section 15, the infringement was upheld under section 1 as a reasonable limit on only one occasion (the controversial 5-4 ruling in *Egan* in 1995). In short, where the Court finds a section 15 violation, it is extremely unlikely that it will uphold that infringement as a reasonable limit under section 1.

Overall this decade, claims based on section 15 have succeeded at approximately the same rate as those based on section 10(b), which has long been viewed as one of the most successful bases for mounting a *Charter* claim. Clearly, the perception that the Court is unreceptive to claims based on section 15 is out of step with current reality. In fact, the *Canada Watch* contributors examining the Court's performance on section 15 in 1997 note that the Court's jurisprudence has shifted significantly over the past two years, providing greater scope for claims based on section 15 to succeed.

As might be expected, there are significant variations in the attitudes of different members of the Court towards *Charter* claims. There are two members of the Court who clearly stand out in terms of their predisposition to rule in favour of *Charter* claimants. Chief Justice Lamer sides with the *Charter* claimant in 45 percent of cases in which he has participated since 1991, followed by Mr. Justice John Major at 39 percent (see TABLE 4, ANALYSIS OF VOTING BEHAVIOUR OF SUPREME COURT JUDGES IN *CHARTER* CHALLENGE CASES, 1991-97). While the Chief Justice has long been regarded as a *Charter* activist, that reputation has not generally been associated with Mr. Justice Major, which makes this statistic somewhat of a surprise. Three other Justices—the late Justice Sopinka, along with Justices Cory and Iacobucci—decide in favour of *Charter* claimants in approximately 30 percent of cases on which they sit, which is slightly below the Court's overall success rate of 31 percent. This group is followed by Mr. Justice La Forest, with a success rate of 28.6% and Madame Justice McLachlin at 26.4%. Finally, the clear *Charter* conservatives on the Court are Mr. Justice Gonthier, at 19.1%, and Madame Justice L'Heureux-Dubé at 18.7%.

It should be pointed out, however, that these same general tendencies do not necessarily apply in respect of the interpretation of all *Charter* rights. In particular, while Madame Justice L'Heureux Dubé has tended to adopt narrow interpretations of the legal rights provisions in the *Charter*, she has been one of the more activist members of the Court in terms of the interpretation of section 15. The same tendency has been evident in the approach of Madame Justice McLachlin, although in the latter instance the variation in approach to the different *Charter* rights has not been as wide.

The Court has also tended to be more divided in *Charter* and constitutional cases than in the non-constitutional por-

TABLE 4: Analysis of Voting Behaviour of Supreme Court Judges in Charter Challenge Cases, 1991-97

SUPREME COURT JUSTICE	NUMBER OF CHARTER CHALLENGE CASES PRESIDED OVER	NUMBER OF CASES IN WHICH A JUDGE FINDS AN INFRINGEMENT	CASES IN WHICH AN INFRINGEMENT IS SAVED UNDER S. 1	REMEDY NOT GRANTED UNDER SS. 24(2) OR 24(1)	SUCCESS RATE %
LAMER	163	80 (49.1%)	5	11	45%
LA FOREST	189	72 (38.1%)	11	7	28.6%
L'HEUREUX-DUBÉ	182	52 (28.6%)	7	11	18.7%
SOPINKA	212	91 (42.9%)	13	14	30.2%
GONTHIER	199	68 (34.2%)	13	17	19.1%
CORY	205	84 (41.0%)	7	14	31.7%
MCLACHLIN	208	70 (33.7%)	4	10	26.9%
IACOBUCCI	187	75 (40.1%)	7	13	29.4%
MAJOR	125	60 (48.0%)	4	7	39.2%
WILSON	10	4 (40.0%)	0	0	40.0%
STEVENSON	35	14 (40%)	2	1	31.4%
BASTARACHE	2	1 (50%)	0	1	50.0%
AVERAGE	155.9	60.9	6.6	9.5	30.3%

tion of its docket. As Table 5 indicates (UNANIMOUS VERSUS SPLIT DECISION), it has been unanimous in just 45% of its constitutional decisions over the past seven years. This compares with an overall unanimity rate of 72% during this same period, an indication that constitutional cases are significantly more contentious and divisive than the remainder of the Court's docket. Perhaps as a result, the Court's judgments are also much longer today than they were a decade ago: the 107 judgments rendered in 1997 will occupy about 3400 pages in the Supreme Court Reports, which is about 1250 more pages than were required to report the 116 judgments rendered in 1987. (Mind you, it should be noted that the Court's output in 1997 was down from the record 4600 pages in the 1990 Supreme Court Reports, required to report 146 judgments issued that year.)

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Over the years, complaints have been voiced from some quarters to the effect that the Court has become increasingly and unduly preoccupied with constitutional and *Charter* cases. The 1997 statistics tend to contradict that argument, however, with the 24 constitutional decisions handed down representing just 23% of the total of 104 judgments rendered by the Court in the year. That compares with 46 constitutional cases of the 124 judgments rendered in 1996 (37%) and 46 of the 103 judgments issued in 1995 (44%).

TABLE 6 (REVERSAL RATES OF THE PROVINCES, 1991-97) sets out the reversal rates for different Courts of Appeal in constitutional decisions of the Supreme Court of Canada over the past seven years.[6] While there are some variations in these reversal rates, overall the Court affirms the decision of the court of appeal on constitutional issues in 60 percent of the cases it hears.[7] (The court of appeal has been affirmed in 165 of the 273 constitutional decisions of the Court in the past seven years.) This, combined with the fact that the Supreme Court now denies leave in 90 percent of the applications it hears, emphasizes the leading role played by the appeal courts of the provinces in the development of constitutional jurisprudence. (One surprise, in fact, is that the Supreme Court is more likely to reverse a provincial court of appeal in a non-constitutional case as opposed to a constitutional case; over the past seven years, it has reversed the court of appeal in about 45% of all appeals heard, which is 5 percent higher than its reversal rate in constitutional cases alone.)

TABLE 5: Unanimous Versus Split Decisions

	UNANIMOUS	SPLIT	PERCENTAGE OF UNANIMOUS
1991	14	26	35%
1992	22	20	52.4%
1993	28	22	56%
1994	13	19	40.6%
1995	10	26	27.8%
1996	25	22	53.2%
1997	13	13	50.0%
Total	125	148	45.8%

Mr. Justice Sopinka's 134 judgments delivered over the 1991-97 period exceeded the total even of the Chief Justice, which is quite extraordinary in light of the fact that the Chief Justice often delivers short oral judgments from the bench on behalf of the entire Court.

TABLE 6: Reversal Rates of the Provinces

	DISMISSED	ALLOWED	REVERSAL RATE
ALBERTA	11	9	45%
ONTARIO	64	26	28.9%
QUEBEC	17	17	50%
SASKATCHEWAN	6	4	40%
NEWFOUNDLAND	2	3	60%
NEW BRUNSWICK	4	6	60%
PEI	4	2	33.3%
BRITISH COLUMBIA	25	20	44.4%
FEDERAL COURT	18	7	28%
NOVA SCOTIA	11	7	38.9%
COURT MARTIAL	0	2	100%
MANITOBA	3	5	60%
TOTAL	165	108	39.5%

From time to time, provincial governments have accused the Supreme Court of being biased in favour of the federal government in its constitutional decisions. This accusation was repeated in a particularly vociferous fashion by the government of Quebec this past year at the time of the hearing of the *Reference Re: Secession of Quebec*. As Table 7 indicates (SUCCESS RATE OF CONSTITUTIONAL CHALLENGES TO FEDERAL AND PROVINCIAL LEGISLATION), the Supreme Court's performance in constitutional cases over this decade lends very little credence to the claims of these provincial critics. Federal legislation has been challenged more frequently than provincial legislation and has been more frequently ruled invalid

continued on page 106

TABLE 7: Success Rate of Constitutional Challenges to Federal and Provincial Legislation

YEAR	CHALLENGES TO FEDERAL LEGISLATION	SUCCESSFUL CHALLENGES TO FEDERAL LEGISLATION	CHALLENGES TO PROVINCIAL LEGISLATION	SUCCESSFUL CHALLENGES TO PROVINCIAL LEGISLATION
1991	18	9 (50%)	8	0 (0 %)
1992	22	10 (45.5%)	5	2 (40%)
1993	19	7 (36.8%)	8	3 (37.5%)
1994	8	3 (37.5%)	6	1 (16.7%)
1995	8	3 (37.5%)	9	1 (11.1%)
1996	7	1 (14.3%)	17	5 (29.4%)
1997	3	1 (33.3%)	10	5 (50.0%)
TOTAL	85	34 (40%)	63	17 (27.0%)

by the Court.

With the departure of Justices Sopinka and La Forest in late 1997, the past year may prove to be somewhat of a watershed in the Court's constitutional jurisprudence. TABLE 8, JUDGMENT OF THE JUSTICES, highlights the important role played by both these members of the Court in constitutional cases this decade. In fact, Mr. Justice Sopinka's 134 judgments delivered over the 1991-97 period exceeded the total even of the Chief Justice, which is quite extraordinary in light of the fact that the Chief Justice often delivers short oral judgments from the bench on behalf of the entire Court.[8] Table 8 also reveals that when Mr. Justice Sopinka prepared written reasons in cases where the Court was divided, he wrote on behalf of the majority 82 percent of the time; this figure was exceeded only by the Chief Justice and Mr. Justice Iacobucci. Conversely, the Justice most likely to write a dissenting opinion in a divided case is Madame Justice L'Heureux-Dubé.

This past year also saw the Court's role in relation to the legislative branches of government being subjected to increasing scrutiny and criticism. The Reform Party, in particular, suggested that the Court was overstepping its proper role and playing an unduly political role in its interpretation of the constitution. While the statistics presented here do not conclusively support or refute that claim, they do provide a context against which it can be evaluated. The bulk of the *Charter* cases coming before the Court have dealt with the legal rights provisions, sections 7-14; these cases have also tended to be those in which the Court has been most likely to rule in favour of the *Charter* claimant. This observation might be thought to cut against the claim of undue activism, since decisions dealing with the legal rights provisions will tend to have their greatest

TABLE 8: Judgment of the Justices

JUSTICE	WRITTEN MAJORITY	WRITTEN MINORITY	UNANIMOUS WRITTEN JUDGMENT	UNANIMOUS ORAL JUDGMENT	ORAL DISSENT	CO-WROTE* MINORITY	CO-WROTE MAJORITY	TOTAL ORAL	TOTAL WRITTEN	TOTAL FOR THE COURT	TOTAL JUDGMENTS
LAMER	56	8	8	21	0	2	2	21	72	29	124
IACOBUCCI	19	3	9	9	0	3	7	9	31	18	63
SOPINKA	42	9	17	23	0	1	6	23	68	40	134.5
GONTHIER	16	6	5	2	0	0	0	2	27	7	36
CORY	29	7	2	5	0	0	0	5	38	7	50
MAJOR	7	4	0	0	0	0	2	0	11	0	12
MCLACHLIN	39	20	3	2	0	0	0	2	62	5	69
WILSON	7	0	0	0	0	0	0	0	7	0	7
STEVENSON	4	2	4	0	0	0	0	0	10	4	14
L'HEUREUX-DUBÉ	30	28	4	1	2	0	0	3	62	7	72
LA FOREST	31	11	6	8	0	0	1	8	48	14	70.5
THE COURT	0	0	0	3	0			3	0	3	6

* Co-written judgments are counted as one-half of a judgment.

impact in terms of law enforcement agencies such as the police rather than on the legislative jurisdiction of Parliament or the provincial legislatures.

At the same time, the concerns of the Court's critics have been directed at particular Court decisions—such as the controversial and important *Delgamuukw* case dealing with aboriginal rights—as opposed to the Court's overall jurisprudence. The statistics presented here track overall trends and do not speak to the results in individual cases. They do remind us, however, that before any changes are made in the method of appointment of judges or the manner in which their judgments are reviewed by Parliament, we must not lose sight of the shape of the forest as a whole as we attempt to discern the significance of individual trees.

NOTES

1. Please note that the methodology used to compile the statistics presented in this article has been revised from that utilized last year. Therefore, the statistics presented in this issue supercede those published in last year's *Canada Watch* Supreme Court issue.

2. See P. Monahan & M. Bryant, "The Supreme Court of Canada's 1996 Constitutional Cases: The End of *Charter* Activism?" 5 *Canada Watch* 41 (1997).

3. Please note that the definition of "success rate" in *Charter* cases is calculated as a fraction, the denominator of which is the total number of *Charter* decisions in the relevant time period, and the numerator of which is calculated as follows: total number of *Charter* decisions in the relevant time period in which an infringement of a *Charter* right is found, minus the number of cases in which the said infringement is upheld under section 1, and minus the number of cases in which no remedy is granted under section 24(1) & (2) in respect of the said infringement. (A *Charter* case is a case in which the decision in the case (i.e., the *ratio decidendi*) was based upon the interpretation or application of a provision of the *Canadian Charter of Rights and Freedoms* (i.e., sections 1-34 of the *Constitution Act, 1982*).

4. A "constitutional case" is defined as a case in which the decision in a case (i.e., the *ratio decidendi*) was based upon the interpretation or application of a provision of the Constitution of Canada, as defined in section 52 of the *Constitution Act, 1982*.

5. The numbers of notices of appeal as of right filed for the previous four years were as follows: 1996—43 notices filed; 1995—57 notices filed; 1994—54 notices filed; 1994—54 notices filed.

6. We would point out that at a *Canada Watch* conference held in April 1998, we presented data on reversal rates for the 1994-97 period only. This data generated considerable media attention, with commentary suggesting that certain courts of appeal were weaker than others. The difficulty with drawing these kinds of inferences was that the number of cases from certain of the smaller provinces over this time period was very limited. In some instances, there were also errors made in the recording of certain cases which, combined with the small numbers of cases involved, presented a misleading impression of the performance of certain courts. We have attempted to counter this difficulty by expanding the database to include the past seven years; we have also rechecked all the entries, so as to verify the accuracy of the numbers presented over the past seven years.

7. Note that the data in Table 6 reflect the affirmation or reversal of the court of appeal on the constitutional issue considered. Thus, if the court of appeal's holding on the constitutional issue is upheld by the Supreme Court, the case is counted as "affirmed", even if the Supreme Court reverses the court of appeal on a non-constitutional issue.

8. Note that to be counted as a judgment, an opinion must state reasons or reasoning that is distinct from that set out in judgments of other members of the Court. For example, a statement by one member of the Court that he or she concurs with the opinion of another member is not counted as a separate judgment, since it does not set forth any different or distinct set of reasons.

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