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SPECIAL DOUBLE ISSUE: SUPREME COURT OF CANADA IN 1996

THE SUPREME COURT OF CANADA'S 1996 CONSTITUTIONAL CASES: THE END OF CHARTER ACTIVISM?

BY PATRICK J. MONAHAN & MICHAEL J. BRYANT

If analysis of Supreme Court of Canada jurisprudence were truly an empirical science, then based on the 1996 statistics one could confidently predict a dismal future for those making constitutional challenges before the Court. For the statistics for last year are rather arresting. *Charter* claims succeeded in only 3 of 27 *Charter* cases decided during the 1996 term. This 1996 "success rate" of 11% is less than one-half of the comparable success rate for *Charter* claims in 1995, and only one-quarter of the 1994 success rate. It is also significantly lower than the comparable figures for the 1987 to 1991 period, when *Charter* claims succeeded on average in approximately one of four cases decided by the Court. (See Figure 1 at p. 43.) These numbers seem to confirm the analysis offered by many of the commentators in this *Canada Watch* special issue to the effect that the Court is now in full retreat from the much-vaunted activism of its first years under the *Charter*. On the other hand, as we argue below, focusing on the numbers alone may not give a complete picture of the manner in which the Court is currently approaching its responsibilities under either the *Charter* or the constitution more generally.

Meanwhile, in arguably the most significant year yet for Aboriginal rights claims under section 35 of the *Constitution Act, 1982*, the numbers in 1996 betray an impressive success rate of close to 1 in 2. Such a success rate could not be more misleading, however, as the Court significantly narrowed the scope of such claims in comparison with the highly activist approach of the Dickson Court in *Sparrow*.

Finally, the 1996 term did not produce any pointed trend in federalism cases, where one out of two constitutional challenges were upheld.[1] The significance here, perhaps, lies in the minuscule number of federalism claims which are being granted leave to appeal by the Court, in contrast with the overwhelming proportion of *Charter* claims making up the constitutional docket. Whereas the first ten years after the *Charter* was entrenched saw nearly one-third of constitutional cases argued on federalism grounds, last year the proportion rested at

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THE CHARTER AND CRIMINAL LAW IN 1996

BY DIANNE L. MARTIN

As David Beatty reminds us (see his article at p. 67), the Supreme Court has had a less-than-bold record of upholding and preserving the constitutional rights of Canadians against infringement by agents of state, particularly in matters of social service entitlement. Beatty would exclude criminal justice from this poor record but, as Alan Young points out, 1996 is the year when the Court seems to be backing away from its commitment to due process safeguards as well. If this is correct, and there is every reason to believe it to be so, the future is somewhat bleak for people facing criminal sanctions. The concern is that as courts become

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5%, down from 12% in 1995. *Quaere* whether this phenomenon parallels the U.S. Supreme Court's approach to federalism claims, which is similarly minimalist today.

Charter litigation at the Supreme Court level is overwhelmingly focused on criminal law matters and, in particular, on four Charter rights: section 7 ("principles of fundamental justice") raised a total of 32 times over the past three years; section 8 ("search and seizure") raised 20 times; section 10(b) ("right to counsel") raised 13 times; and section 11(d) (right to "independent and impartial tribunal") raised 12 times.

Despite the story told by the numbers, there were several significant developments which shade any bright lines arising from a quantitative analysis of the Court's jurisprudence. Aboriginal rights may finally be said to have a substantial jurisprudence to which lower courts may turn, as the literally dozens of B.C. Aboriginal rights claims working their way through the courts for nearly a decade have finally achieved closure.[2] Moreover, the search and seizure law under the *Charter* that had so transformed the way police and Crowns did their job in the 1980s has now settled down to the point where significant latitude and discretion is left in the hands of those investigating and prosecuting crimes, without fear of technical violations resulting in a *Charter* breach or, more significantly, that any such violation would result in the exclusion of evidence under section 24(2). And the Court continues to circumscribe those instances where free expression or mobility rights permit the violation of criminal laws targeting a profound and contemporary social issue.[3]

A number of interesting trends do emerge from a closer scrutiny of the *Charter* cases of the past three years. First, *Charter* litigation at the Supreme Court level is overwhelmingly focused on criminal law matters and, in particular, on four *Charter* rights: section 7 ("principles of fundamental justice") raised a total of 32 times over the past three years; section 8 ("search and seizure") raised 20 times; section 10(b) ("right to counsel") raised 13 times; and section 11(d) (right to "independent and impartial tribunal") raised 12 times. (See Table 1 at p. 45). The challenges based on these "big four" *Charter* rights account for close to three-quarters of all the *Charter* claims considered by the Court over the past three years, with no other *Charter* section being raised in more than 5 instances.

These figures will provide great fodder for those advocating the abolition of appeals as of right for those criminal cases in which either an acquittal is overturned, or a judge has dissented on a question of law—inevitably involving one or more of the "big four" *Charter* rights.[4] The various appeal-as-of-right cases do clog up the docket, the argument goes, thereby giving rise to an over-representation of challenges under the "big four" *Charter* rights, and garnering too much of the Court's attention to the detriment of other constitutional rights.

[T]he extradition and sentencing cases challenged under section 7 (and section 12) of the Charter were all unsuccessful, with the Court holding that while the foreign punishments awaiting the Charter claimant were severe, they were the result of accountable decisions made by lawmakers seeking to address the very serious problems raised by the narcotics industry.

At the same time, the Court's approach to claims under these "big four" *Charter* rights varies significantly. The Court is most receptive to claims involving the right to counsel under section 10(b) (which succeeded in 9 of the 13 cases in which it was raised over the 1994-96 period) and the right to be secure against unreasonable search and seizure (which succeeded in 7 of the 20 cases in which it was raised). As Table 2 indicates (see p. 46), the Court's relatively activist approach to section 10(b) and section 8 continues a trend that emerges from the 1990-91 statistics as well. (However, the success of section 8 may be ephemeral in light of the Court's tendency to admit evidence obtained in five of the seven instances where a violation of this section was found.)

Contrast those numbers with the results under section 7, the most frequently litigated *Charter* section over the past three years, where the claims succeeded in just five of 32 cases. These results under section 7 represent a marked decline from the comparable statistics in the 1990-91 period, when section 7 claims succeeded in 12 of the 32 cases they were raised. According to the Court in 1996, the "principles of fundamental justice" in section 7 were said to protect individual liberties but also to require corresponding individual responsibilities to state and society.[5] For example, the extradition and sentencing cases challenged under section 7 (and section 12) of the *Charter* were all unsuccessful, with the Court holding that while the foreign punishments awaiting the *Charter* claimant were severe, they were the result of accountable decisions made by lawmakers seeking to address the very serious problems raised by the narcotics industry.[6] Nor did defendants' rights to a fair trial triumph via *Charter* claims in instances where the accused waived fair trial rights either through voluntary consent or sharp practise.[7]

It is also important to note that there were some interest-

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FIGURE 1: Comparative Success Rates for SCC Constitutional Cases

• Only decisions in which a determination has been made on a constitutional challenge have been included.
• For the purposes of the following analysis, if an infringement is found in an evidence case, it is only deemed to be successful if a remedy has succeeded under section 24.

1996

	Number	Successful Challenges	Success Rate
Charter Cases	27 (69.2 %)	3	11.1 %
Federalism Cases	2 (5.1 %)	1	50 %
Aboriginal Cases	10 (25.6 %)	4.5[1]	45 %

1995

Charter Cases	29 (87.9%)	7	24.1%
Federalism Cases	4 (12.1%)	2	50%
Aboriginal Cases	—	—	—

1994

Charter Cases	24 (77.4%)	10.5[2]	43.8%
Federalism Cases	5 (16.1%)[3]	1	20%
Aboriginal Cases	2 (6.5%)	—	—

[1] 0.5 denotes that in the case in question, an accused was charged with two offenses, only one of which was found to infringe on his Aboriginal rights.
[2] The 0.5 connotes the *Daviault* case in which one of two infringements was justified under section 1.
[3] The *Tolofson* case, in which the constitutional determination was a minor issue, was included here.

Comparative Success Rates for Charter Cases Between 1987 and 1991

	Number	Successful Challenges	Success Rate
1987	26	7	26.9%
1988	23	6	26.1%
1989	36	10	27.8%
1990	56	17	30.4%
1991	33	10	30.3%

• 1987 was selected as the base year as it was the first time more than 25 *Charter* decisions were handed down in one year.
• For the purposes of this table, "success" has been defined as cases in which both the *Charter* claim and the disposition were successful.

TABLE 1: Success Rate of Constitutional Challenges in the Years 1994-96 by Charter Section

- There are more *Charter* challenges than cases in a given year as several challenges are often raised in the same case; in fact, two distinct s. 7 arguments were made in the *Jobin* case.
- Where in a single case there has been more than one challenge under different aspects of the same section (i.e., s. 7), for the purposes of this Table that section is counted only once unless the challenge was in relation to two separate objects (as defined above) in the same case, or where multiple challenges to the same section culminated in conflicting results.
- "Success" in this Table is defined as infringements not saved by s. 1.
- For the purpose of the following analysis, if an infringement was found in an evidence case and the evidence was not excluded under s. 24(2), the claim was nonetheless deemed successful as a violation was found.
- If the Court has only made a determination that there is an infringement, yet has not made a s. 1 determination, the challenge has been deemed "successful" for our purposes.
- In those cases in which the s. 1 issue has not been dealt with (i.e., s. 8 evidence cases), it has been deemed that the "infringement was not saved under section 1".

Charter Section	Number of Challenges	Infringements Found	Infringement Not Saved under s. 1	Evidence Excluded under 24(2) or Remedy Granted under 24(1)	Success Rate
2(a)	3	2	0	—	0%
2(b)	7	4	2	—	28.6%
2(d)	1	0	—	—	0%
3	1	1	0	—	0%
6(1)	3	0	—	—	0%
7	32	5	5	0	15.6%
8	20	7	7	2[1]	35%
9	2	2	2	2	100%
10(a)	1	1	1	1	100%
10(b)	13	9	9[2]	7	69.2%
11(a)	1	0	—	—	0%
11(b)	5	0	—	—	0%
11(d)	12	7	5	1	41.7%
11(g)	1	0	—	—	0%
12	4	0	—	—	0%
14	1	1	1	1	100%
15(1)	5	1	1	—	20%
28	1	0	—	—	0%
32	1[3]	0	—	—	0%
TOTAL	**114**	**40**	**33**	**14**	**29%**

[1] The *Patriquen* case, in which the evidence is excluded, is not one of the five cases where an infringement is found as no decision was made on the s. 8 issue. Evidence was excluded because admission would have brought the administration of justice into disrepute.

[2] In the *Calder* case, which was included here, the Court excluded the use of evidence previously (judicial precedent) deemed to be in violation of s. 10(b) and excluded for other purposes.

[3] The challenge in *Hill* v. *Church of Scientology* failed as it did not come within the realm contemplated by s. 32.

ing developments in the jurisprudence which, though not resulting in a successful constitutional challenge, did result in some enlargement of a criminal defendant's rights. (The separate commentaries by Dianne Martin and Alan Young elsewhere in this issue survey the developments in the criminal law area in more detail.) In *Evans and Evans* v. *R.*, the Court held that there was a breach of the defendants' section 8 search and seizure rights, although the evidence was not excluded under section 24(2). In that case, the police officer knocked on the defendants' door on an anonymous tip that the defendants were growing marijuana in their home. Upon detecting the scent of marijuana, the police immediately arrested the defendants, resulting in their conviction for possession of marijuana for the purposes of trafficking. As that original warrantless search was not

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TABLE 2: Success Rate of Constitutional Challenges in the Years 1990-91 by Charter Section

Charter Section	Number of Challenges	Infringements Found	Infringement Not Saved under s. 1	Evidence Excluded under 24(2) or Remedy Granted under 24(1)	Success Rate
2(a)	1	0	—	—	0%
2(b)	12	9	3	—	25%
2(d)	4	1	0	—	0%
3	2	0	—	—	0%
6	1	0	—	—	0%
7	32	12	12	4[1]	37.5%
8	14	9	9	2	64.3%
9	4	1	0	—	0%
10(a)	2	2	2	1	100%
10(b)	6	5	5	4	83.3%
11(b)	2	1	1	—	50%
11(c)	2	0	—	—	0%
11(d)	18	15	9	—	50%
11(g)	2	0	—	—	0%
11(h)	1	0	—	—	0%
12	5	1	1	—	20%
13	3	0	—	—	0%
15(1)	16	5	2	—	12.5%
23	2	1	1	—	50%
26	1	0	—	—	0%
28	1	0	—	—	0%
32	4	0	—	—	0%
General *Charter* Values	1	0	—	—	0%
TOTAL	136	62	45	11	33.1%

[1] In *R.* v. *A.*, the Court held that s. 24 is applicable to persons living outside Canada. In this instance, however, no s. 7 violation was proven at trial. A new trial, therefore, was ordered.

"authorized by law" it was presumed unreasonable. A subsequent search conducted under a warrant was also held to be contrary to section 8 since that warrant had been obtained in part on the basis of the warrantless sniffing search. It is worth noting that this finding diverges from the well-established American jurisprudence on point, whereby sniffing marijuana is not said to constitute a search. In this sense, the Canadian Court has continued to evince a willingness to extend rights to criminal accused in Canada that have been denied by the U.S. Supreme Court.[8]

Nor did the Court tolerate racially inspired abuse of a suspect. In *McCarthy* v. *R.*, the accused testified that he was physically and verbally abused by a police officer during a search of his apartment, under a search warrant, involving a charge of several weapons offences. The evidence of racially inspired abuse was enough for the Court to find that there was a violation of the defendant's search and seizure rights under section 8 of the *Charter*.

Among the small number of *Charter* infringements found by the Court in 1996, nearly one-half were upheld under section 1. (See Table 3 at p. 47.) This represents a much greater willingness to utilize section 1 than was the case in previous years. In 1994 and 1995, no more than one in 10 *Charter* infringements were upheld under section 1, while in the 1990-91 period less than one in three violations was upheld. Whether the Court's greater reliance on section 1 in 1996 represents an emergence of a new trend or merely an one-time anomaly will have to await the results of future years.

A bare reading of the statistics might seem to suggest a banner year for Aboriginal rights at the Court. In four appeals to the Court, it was held that the Crown had failed to meet the infringement and justification test under section 35. For instance, in *Gladstone* v. *R.*, the Court held that an

Aboriginal right to fish was infringed by a statute containing no internal limit requiring the government to prioritize Aboriginal use of the resource over the use of others. The year's-end results of a 45% success rate, therefore, might suggest a wildly successful year for Aboriginal litigants before the Supreme Court of Canada.

As the commentary by Kent McNeil elsewhere in this issue indicates, however, the Court's 1996 Aboriginal cases represented a discernible narrowing of Aboriginal rights. Whereas the decision of the Court in *Sparrow* was an historic moment in the Crown-Aboriginal relationship, with the Crown held subject to exacting fiduciary duties of justification and prioritization, in 1996 the Court narrowed *Sparrow* substantially. This narrowing arises from the Court's rejection of a broad contemporary approach to Aboriginal rights and indigenous practices, instead holding that those indigenous practices which were not explicitly evidenced at the time of European contact with Aboriginal people are not said to be protected under section 35. So, for instance, if the evidence suggests that a particular tribe traded fish for various supplies, rather than currency, then those people would not be said to engage in commercial fishing. Such was the result reached by the majority in *Van der Peet* v. *R.*, *N.T.C. Smokehouse Limited* v. *R.*, *Lewis* v. *R.*, *Pamajewon and Jones* v. *R.*, and *Badger* v. *R.*[9]

In terms of federalism review, we have already noted the small number of federalism cases currently being decided by the Court. It is also important to remember that the Court's *Charter* and Aboriginal rights jurisprudence have implications for federalism. As Table 4 indicates, over the past three years a total of 23 provincial statutory provisions and 18 federal statutory provisions were challenged on the basis of the constitution (*i.e.*, both the 1867 and 1982 *Constitution Acts*), with the challenges succeeding in 8 of the 23 provincial cases and 5 of the 18 federal cases. The small difference in the relative success rate in these two groups of cases (34.5% success rate in challenges to provincial laws versus 28% in challenges to federal laws) does not appear to be particularly significant, given the limited number of decisions in each category.

One interesting development, however, is that the large number of cases involving Aboriginal rights in 1996 primarily involved challenges to provincial legislation (8 of 10 cases). This is in contrast to *Charter* cases, where the majority of cases involves a challenge to the conduct of public officials rather than to legislation (see Table 4 at p. 49). Moreover, in the 22 *Charter* cases over the past three years involving a challenge to

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TABLE 3: The Use of Section 1 in Charter Challenge Cases

	1996	1995	1994
Number of Cases	27	29	24
Violations Found	8 (29.6% of total)[1]	10 (34.5%)	13 (54.2%)
Violations Upheld under s. 1	4 (50% of violations found)	1 (10%)	0.5 (3.9%)[2]
Violations not Saved under s. 1	4 (14.8 % of total)	9 (31%)	12.5 (52.1%)

• If no s. 1 determination has been made, yet an infringement has been found, the violation has been deemed to be a "violation not saved under s. 1".

• It is interesting to note that where there are violations found in evidence cases, these violations are rarely saved by s. 1. Instead, s . 24 has acted to minimize the practical effects of *Charter* rights violations in evidence cases by excluding evidence and staying proceedings only in the cases with the most serious violations.

[1] Both the *Goldhart* and *Calder* cases involve the existence of *Charter* infringements, yet as those determinations were made in prior decisions (as the issue in these cases involved the exclusion of evidence based on those infringements), those infringements were not included here.

[2] This connotes the *Daviault* case in which two violations were found, one of which was saved under s. 1 while the other was not.

	1991	1990
Number of Charter Challenges[1]	43	93
Violations Found	19	43
Violations Upheld under s. 1	4 (21.1% of violations found)	13 (30.2%)
Violations Not Saved under s. 1	15 (34.9% of total)	30 (32.3%)

[1] This table records total number of *Charter* sections considered, rather than number of cases; therefore, the totals for these years are not directly comparable with the data from 1994-96.

a statute, in over one-half of the cases it was a federal rather than a provincial law that was under scrutiny. The success rate in challenges to federal laws was also higher than the comparable rate in cases involving provincial statutes. (Three of the 13 Charter challenges to federal laws succeeded, a 23% success rate, whereas just one of the nine Charter challenges to provincial laws was successful, an 11% success rate; see the Appendix for a full listing of the cases over the 1994-96 period.) Significantly, this finding contradicts the results of an earlier study of the Court's first 100 *Charter* cases, which had found the *Charter* being used to strike down provincial statutes more frequently than federal laws.[10]

The jury remains out on the general orientation of the present Bench, although the 1996 statistics appear to confirm the intuition that the Supreme Court of Canada will not engage in any sweeping activism in the area of constitutional law.

In general terms, the results of the 1996 term seem to suggest a growing divergence from the activism for which the Dickson Court was famous. On the other hand, both the findings of the Court in the area of Aboriginal rights and the statistics on *Charter* claims might be viewed from a different perspective. Some of the success of *Charter* claimants and Aboriginal litigants during the 1980s may have reflected the initial clash with long-standing and outdated legislative schemes governing various individual liberties; thus, the success rate of a decade past would have resulted as much from the activism of the Court as the deficiencies of the legislation at issue. The criminal justice system has since tailored itself to the *Charter*, just as the various Crown regulatory schemes have adapted to the fiduciary obligations imposed by *Guerin* and *Sparrow*. In this sense, Parliament and the legislatures have become more *Charter*-friendly (and perhaps *Charter*-savvy), amending those statutes and practices in a manner that is more respectful of individual liberties and Aboriginal rights. Viewed in this way, the 1996 statistics might suggest more a judicial period of stability than one of blind deference to public officials.

Whether one views these statistics as depressing or refreshing may depend on more political variables. Those lamenting the legalization of politics by so-called "*Charter* Canadians" will declare sad vindication of their theory that the oppressed took their grievances to the wrong tribunal—and an undemocratic, conservative one at that. Those celebrating the 1996 results will no doubt claim that the state acts more justly today thanks to the *Charter*, and that the Court has merely sanctioned legislative reforms resulting in those "principles of fundamental justice" which balance individual rights claims with societal responsibilities. Regardless of their position, those seeking grandiose conclusions from this snapshot of the Court's constitutional jurisprudence ought to exercise caution in their analysis. The jury remains out on the general orientation of the present Bench, although the 1996 statistics appear to confirm the intuition that the Supreme Court of Canada will not engage in any sweeping activism in the area of constitutional law.

Notes

[1] *Re: Residential Tenancies Act*, S.M.S. 1992, c. 31. The Court considered the validity of Nova Scotia legislation giving provincial civil servants the right to investigate, mediate, and adjudicate disputes between landlords and residential tenants, the legislation being held to be *ultra vires* s. 96 because the Superior Courts have exclusive jurisdiction over tenancy disputes. In *Ontario Home Builders Association* v. *York Board of Education*, the Court held that a by-law authorizing school boards to levy development charges against builders as a condition of obtaining a building permit was one of indirect taxation and therefore *ultra vires* s. 92(2). However, the charges were held to be within provincial competence and ancillary to a valid regulatory scheme for the provision of educational facilities under section 92(9), (13), (16) and therefore valid.

[2] But note that *Delgamuukw* v. *R.*, the appeal containing the largest evidentiary record and the broadest of issues amongst these claims, will be heard this coming June. See generally F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Montreal: Institute for Research on Public Policy & Oolichan Books, 1992).

[3] In *Attis* v. *Board of School Trustees*, the Court held that s. 2(b) of the *Charter* was infringed by an order of the Human Rights Tribunal against a school board to discipline a teacher who made racist remarks outside of a classroom, but the order was justified under s. 1 as properly tailored to the objective of remedying discrimination within the educational environment in the school board. In *Adler* v. *R.*, the Court held that the non-funding by the Province of Ontario of Jewish schools and independent Christian schools under the *Education Act* did not infringe upon free association or equality rights under the *Charter* because s. 93 of the *Constitution Act, 1867* leaves the funding decision immune from *Charter* review, either due to the nature of the historical compromise made at the time of confederation or as *per* s. 29 of the *Charter*. In *CBC* v. *A.-G. for New Brunswick*, the Court held that legislation excluding the public and the media from those parts of a criminal proceeding dealing with the specific acts committed during a trial on charges of sexual assault was a justified limit upon free speech in protecting the innocent and providing a remedy for the under-reporting of sexual offences.

[4] Pursuant to ss. 691-93 of the *Criminal Code*, where a provincial Court of Appeal judge dissents on a conviction, that accused has an appeal as of right to the S.C.C. The same is true for a reversal of an acquittal verdict, regardless of dissent.

[5] See M.J. Bryant, "Criminal Fault As *Per* the Lamer Court and the Ghost of William McIntyre" (1995) 33 Osgoode Hall L.J. 79.

[6] *Minister of Justice* v. *Jamieson*; *Whitley* v. *U.S.A.*; *Ross* v. *U.S.A.*

[7] *Howell* v. *R.* and *R.* v. *Richard*; *Dorion* v. *R.*; *R* v. *C.A.M.*; *M.P.B.* v. *Moring*; and *Burke* v. *R.*

[8] See discussion in P.W. Hogg, *Constitutional Law of Canada* (Carswell: looseleaf edition, 1996) at section 45.4(d).

[9] In fact, the "frozen rights" ap-

TABLE 4: The Objects of Constitutional Litigation in Supreme Court Cases

- "Successful" is defined as the finding of an infringement of the *Charter* not saved by s. 1. In evidence cases, "successful" is defined as a granting of a remedy under s. 24. In federalism cases, "successful" is defined as a determination of *ultra vires*.
- "Other" in these cases refers to a common law doctrine, the interpretation of such a doctrine, or to administrative decisions.
- "Legislation" includes subordinate legislation, regulations, and orders in council.
- There may be more objects than cases as some cases contain challenges against more than one object.
- If the same object is challenged by more than one section in the same case, it will only be counted once for the purpose of the following analysis.

Object of Challenge	Number of Challenges	Constitutional Claim Succeds	Constitutional Claim Fails	Success Rate
1996				
Legislation	18	7	11	38.9%
Conduct of Public Official	21	2	19	9.5%
Other	1	1	0	100%
TOTAL	40	10	30	25%
1995				
Legislation	14	4	10	28.6%
Conduct of Public Official	18	5	13	27.8%
Other	2	0	2	0%
TOTAL	34	9	25	26.5%
1994				
Legislation	11	3	8	27.3%
Conduct of Public Official	19	7	12	36.8%
Other	2	2	0	100%
TOTAL	32	12	20	37.5%
1991				
Legislation	30	10	20	33.3%
Conduct of Public Official	4	1	3	25%
Other	6	2	4	33.3%
TOTAL	40	13	27	32.5%
1990				
Legislation	31	7	24	22.6%
Conduct of Public Official	28	9	19	32.1%
Other	9	2	7	22.2%
TOTAL	68	18	50	26.5%

proach also governed the successful Aboriginal rights claims before the Court, such as *Gladstone*, only that in those successful appeals the evidence actually satisfied this narrow test.

[10] See F.L. Morton *et al.*, "The Supreme Court's First One Hundred *Charter* of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1.

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