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An Introduction to the 1981-1990 S.C.R. Statistical Analyses

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This statistical study represents the combined efforts of the Board of Editors of two volumes of the *Osgoode Hall Law Journal.* For a number of years the *Journal* had published an annual statistical analysis of the previous year's work of the Supreme Court of Canada. The first analysis, concerning the work of the Court from 1961 to 1963 appeared in 1964.[1] In the following issue,[2] there appeared an analysis of data drawn from the [1964] S.C.R., a pattern which was followed annually for the next several years. The last statistical review was published by the Board ten years ago.[3] In an effort to bring the statistical analysis up to date, the 1992 and 1993 Board of Editors initiated this project.

The Board initiated this analysis of ten years of data in the belief that the increasing importance of the role of the Supreme Court justified the reinstatement of this annual contribution to the work of studying and analyzing the Court. This study covers Supreme Court of Canada decisions reported in the *Supreme Court Reports* and the *Bulletin of proceedings taken in the Supreme Court of Canada* from 1981 to 1990. For the sake of continuity, the S.C.R. General Tables produced here have not been substantially altered from their original form, last produced from the 1980 *Supreme Court Reports.*

With the enactment of the *Canadian Charter of Rights and Freedoms*[4] in 1982, there was an additional need, in the Board's view, for a yearly statistical review focussed exclusively on *Charter* decisions. To this end, a series of additional tables were formulated with the aid of Professor Sidney R. Peck.[5] These draft tables were then revised after consulting with a number of academics in various legal fields. The *Osgoode Hall Law Journal* would like to thank Professors John M. Evans, Judith A. Fudge, Peter W. Hogg, G. Thomas Johnson, Roderick A.

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[1] Osgoode Hall Law Journal, "Supreme Court Review (Statistics)" (1964) 3 Osgoode Hall L.J. 180.

[2] Osgoode Hall Law Journal, "Statistical Analysis of Cases Contained in [1964] S.C.R." (1965) 3 Osgoode Hall L.J. 445.

[3] Osgoode Hall Law Journal, "Statistical Analysis of [1980] S.C.R." (1982) 20 Osgoode Hall L.J. 402.

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

[5] The initial draft owes much to work done by F.L Morton in "Charting the *Charter* - Year One: A Statistical Analysis" (1985) Can. Human Rights Yearbook 237; and F.L. Morton, P.H. Russell & M.J. Withey in "The Supreme Court's First One Hundred *Charter of Rights* Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1.

Macdonald, Michael Mandel, John D. McCamus, Mary Jane Mossman, Peter H. Russell, and Katherine E. Swinton for their kind assistance. Following their suggestions, criticisms, and concerns, we have attempted to design tables that are comprehensive enough to be useful to researchers, sensitive to current *Charter* claimants, and broad enough to anticipate future trends in *Charter* litigation.

Considerable care was taken to ensure the accuracy and consistency of the interpretation of the raw data for each year. The data in the S.C.R. General Tables were generated from records entered into a computer database. The data in the S.C.R. *Charter* Tables were calculated manually. The following sections will explain the source and interpretation of the data, indicate any changes from the pattern followed in the 1980 and earlier tables, and describe what the tables convey.

I. THE S.C.R. GENERAL TABLES

The data for these tables were gathered primarily from the *Supreme Court Reports*. The data for "Unreported Motions" for Table I were gathered from the *Bulletin of proceedings taken in the Supreme Court of Canada*. The information was, in most cases, compiled from the headnotes. Where this provided insufficient or unclear data, the full judgment was examined. This was most common when multiple judgments and voting blocks appeared in cases with multiple issues.

A. *Table I - Volume of Work*

Two categories, "Unreported Appeals" and "Unreported References," were dropped from this table. This was consistent with our general policy on changes: where the information appeared misleading or inconsequential, it was eliminated to streamline the tables. The *Supreme Court Reports* now include all appeals and references. Thus there should not be any unreported judgments nor should there be any unreported references to report. The "Other" category in "Unreported Appeals" would continue to show reserved but undecided cases. However, as the relationship of this statistic to any backlog is inconclusive, it was decided that "Unreported Appeals" could be

dropped altogether. Cases primarily involving procedural matters were classified as either "Private" or "Public" for the purposes of Table I. This was done by examining the underlying subject matter or the parties involved. "Reported Motions" includes only original motions. Where the motion or application was simply refused or granted, it was noted as such. Where the decision differed or was qualified in any way, it was noted as "Other" and an explanatory footnote was included. The category, "Unreported Motions," was formatted in the same manner.

B. *Table II - Breakdown by Source*

This table has not been altered from its original form. The number under "Total From Source" is the sum of the row except under two circumstances: first, where the case has been classified as both "Private" and "Public" and, second, where the dispositions of multiple appeals differed. In either situation, the case has been noted only once under "Total From Source" and a footnote has been included. Cases in which multiple appeals were joined from different jurisdictions have been included beside each source and have been added into "Total From Source." "Total" at the bottom represents the sum of each column.

C. *Table III - Subject Matter of Litigation*

Some of the subject categories for this table have been altered. In some cases, subjects have been amalgamated and, in other cases, the subject names have been modified slightly. The two most notable changes are the addition of the subject heading "*Charter*" and the Civil Law categories under the "Appellate - Private" section. The latter follows the index of the current *Civil Code of Quebec.*

Original motions and references are classified under "Original Jurisdiction" only and will not be included under other subject headings. Appellate cases with multiple subject matters have been noted more than once and are referred to in the footnotes. Where the disposition or majority/dissent ratio in a case differed, it has been noted as such but included only once under "Number of Cases Reported."

While cases that are predominantly procedural in nature have been classified as either "Private" or "Public" under Table I, for the purposes of Table III, they have only been noted under the heading "Procedural."

Cases with multiple subject matters have been included under more than one category and have been referred to in the footnotes.

D. *Table IV - Majority/Dissent Ratio*

No changes have been made to this table. Cases with multiple majority/dissent ratios have been noted under their respective headings but have been included only once under "Total Number of Cases Reported." Footnotes for these cases have been included.

E. *Table V - Type of Work*

This table has not been altered. Multiple entries have been made for cases which fall under more than one category. Cases have not been included when a justice was present for the hearing but did not take part in the judgment.

F. *Table VI - Action of the Justices*

In this table, as in Table V, cases have only been included when the justice took part in the judgment. Unusual occurrences, such as a justice concurring with both the dissent and majority judgments or a dissenting position with no judgment being delivered, have been indicated in the footnotes.

Those cases in which a single, non-attributable judgment was delivered by the court are noted under "The Court." "Number of Cases" is the total of all "Judgments," "Concurrences," and those cases noted under "The Court." No distinction is made between judgments that were written and those that were delivered orally.

II. THE *CHARTER* TABLES

Data for the S.C.R. *Charter* Tables, like the S.C.R. General Tables, were collected primarily from the *Canadian Supreme Court Reports*. Due to the complexity of many of the cases, compilation of the data usually required a careful analysis of the full judgment and, in some cases, the decision written by the subordinate court.

Cases are included in these tables if the *Charter* was referred to in the headnote *and* was considered in the judgment. The *Charter* need not have been the deciding factor to merit inclusion. Conversely, where the *Charter* was referred to in the headnote and not considered in the judgment, and the decision of the subordinate court was not referred to, the case has not been included in these tables.

Where appeals with similar *Charter* claims were heard together, each case was included separately. This obviates the somewhat subjective question of which cases are "linked" and allows for the inclusion of different dispositions. For example, a dissenting justice in the first case may concur with the majority in latter cases after a precedent has been established. When appeals have been joined and disposed of together, the cases have been noted once except: when the source of the appeals differed, when the outcome was different, or when the majority/dissent ratio was different.

A. *Table VII - Success Rate of Charter Claimants*

As noted in footnote 1 of Table VII, the category "Claimant Wins" includes cases in which both the *Charter* claim and the disposition were successful. The category "Claimant Loses" includes cases in which both the *Charter* claim and the disposition were unsuccessful. The category "Other" includes cases where the claimant won the *Charter* argument but lost the disposition on other grounds or the claimant lost the *Charter* argument but won on other grounds.

B. *Table VIII - Object of Charter Litigation*

The category "Legislation" includes subordinate legislation, Orders in Council, and regulations. If the legislation expressly or by

necessary implication authorized the limitation of the *Charter* right or freedom, the case will be noted under "Legislation." If the legislation confers a broad discretion, the case will be noted under "Administrative Decisions" or "Administrative Rules."

The category "Conduct or Decisions of Public Officials" encompasses a broad range of public persons. The most common is law enforcement officers but this category also includes civil servants, elected officials, judges, and crown attorneys.

Cases with multiple objects of *Charter* litigation have been included under more than one category and have been referred to in the footnotes.

C. *Table IX - Charter Litigation by Source*

Appeals from different sources that were joined together are noted under each jurisdiction but included only once under "Total."

In some cases, the claimant won the appeal and a new trial was ordered. This is noted under "Claimant - Wins" while the lower decision is noted as "Other," because the lower decision was neither wholly affirmed nor reversed.

D. *Table X - Subject of Charter Litigation*

For the purposes of this table, the *Charter* sections have been separated into discrete headings. Subtotals have been included for section 2 "Fundamental Freedoms," section 7 and section 11(d) "Legal Rights," and section 15(1) "Equality Rights." Where a case has been included under these sections under specific rights and freedoms, it is included only once in the subtotal.

The section 1 analysis only applies where the right or freedom was limited and where the limitation was "prescribed by law." Thus, those cases in the categories "Conduct or Decisions of Public Officials," "Administrative - Decisions," and "Common Law" will not fall under section 1.

Cases with multiple subject matters have been included under more than one category and have been referred to in the footnotes.

E. *Table XI - Action of the Justices*

This table notes the number of times that each justice wrote or orally delivered a judgment on his or her own, when a judgment was co-written with another justice, and when a justice concurred with a judgment written by someone else. Each of these three headings have been subdivided into judgments/concurrences for the "Court," "Majority," and "Dissent." Judgments for the "Court" only arise when the justice wrote or orally delivered the unanimous decision. A judgment is classified as being "Co-Written" when it is attributed to two or more justices. Justices who were present for the hearing of the appeal but did not participate in the judgment are not included in this table.

In many cases, justices delivered very brief judgments where they concurred with the judgment of another justice and merely added a few comments, or focused on a specific area of another justice's judgment. These cases are noted under "Judgments Written" and "Concurrences With Another Justice" unless the written judgment only includes an unqualified concurrence. In the latter instance, the case will be noted as only a concurrence.

F. *Table XII - Voting Behaviour of Justices*

This table displays how many times individual justices voted for the *Charter* claimants or for the Government. For example, a "Majority Judgment For the Claimant" includes those case where a justice wrote a majority judgment and the claimant won the *Charter* argument as well as the appeal itself. A "Judgment or Concurrence With - Other" denotes those cases in which the claimant won the *Charter* argument but lost the disposition on other grounds or the claimant lost the *Charter* argument but won on other grounds.

The category "Support For" simply sums those cases in which the justice supported the claimant or the government (or decided otherwise).

The "Section 1" category notes the frequency with which the justice pronounced on section 1 of the *Charter* constitutional issue, regardless of the final disposition of the case. Thus, a case may be counted more than once.

G. *Table XIII - Type of Charter Claimants*

For the purposes of this table, claimants are classified into five groups: "Business Corporations," "Individuals," "Interest Groups," "Unions," and "Other." Co-claimants in the same appeal can fall under more than one category and will be noted as such in the table as well as in a footnote.

The presence of interveners is also noted as is the number of wins by either the claimant or the government. "Interveners Present For Claimant" and "Interveners Present For Government" count those cases in which the interveners only represented the claimant. "Interveners For Both" counts those cases where interveners were present for both parties.

H. *Table XIV - Majority/Dissent Ratio*

This table sums the frequency of voting ratios. Where a case has more than one issue or multiple appeals with different ratios, it will be included under each appropriate heading and a footnote will be included.

I. *Table XV - Legal Rights and Section 24(2)*

Table XV isolates the number of cases heard under the "Legal Rights" sections (7 - 14), the number of claimant wins and losses, and cross-references each section with section 24(2).

The last four columns show how many times section 24(2) was used and how often the evidence was excluded or admitted. The "Other" category includes cases in which some evidence was excluded and some was admitted.

III. CONCLUSION

The data contained in the tables have been incorporated into summary tables. For the consolidated S.C.R. General Tables, this includes the [1981] S.C.R. to the [1990] S.C.R. The consolidated *Charter*

Tables include the [1984] S.C.R. to the [1990] S.C.R. and are included in Peter Russell's commentary, *supra.*[6] It is hoped that these tables will appear on a regular basis in forthcoming volumes of the *Osgoode Hall Law Journal.*

This project would not have been possible but for the efforts of Natalie Derzko, Fay Faraday, Mark Hadfield, Clifford Louie, Christine McKenna, Colin Robinson, Lorne Sossin, Beverley Stone, and previous editors of the *Journal.* Special thanks are extended to Professors Sidney R. Peck and John D. McCamus for their extensive and generous assistance and support throughout all phases of this project.

We hope that this information will be used to analyze the effects and impact of the *Charter* as well as the type of work and behaviour of the Supreme Court. The current sample size is quite small and caution must, of course, be exercised in analyzing the data. Those who have participated in this project hope that the data collected and analyzed in this and, hopefully, future volumes of the *Journal* will provide a useful foundation for further research and study.

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[6] See P.H. Russell, "The Supreme Court in the 1980s: A Commentary on the S.C.R. Statistics," also in this volume at 771.