

The Enshrinement of Rights: Courts and Constitutional Power in Canada

Abstract:

In 1982 Canada undertook to enshrine civil liberties protections within its newly patriated Constitution. The resulting document, the *Canadian Charter of Rights and Freedoms*, signaled a drastic shift in the attitudes of Canadian elites in regards to theories of governance and rights protection.

The shift, or rather something akin to it, had been attempted once before in Canada. In 1960, the Canadian Parliament had enacted a statutory Bill of Rights, the *Canadian Bill of Rights*. Heralded by civil libertarians, the *Canadian Bill of Rights* proved largely a failure. The judiciary, most notably the Supreme Court, was hesitant to enforce the rights contained in the document.

The reception of the Canadian judiciary to the *Canadian Charter of Rights and Freedoms* has been wholly different versus that received by the *Canadian Bill of Rights*. Since 1982, and the promulgation of the *Charter*, the Supreme Court of Canada greatly expand the scope and substance of civil liberties in Canada through its broad judicial interpretation of the *Charter*. Mainstream legal scholars pin this shift towards the fact that the *Charter* constitutionally entrenched civil liberties, thereby giving the Supreme Court the legitimacy and cover to dramatically expand and enforce said rights. Certain political scientists, on the other hand, have argued that the *Charter* was the end result, not the catalyst, of the expansion of civil liberties by the Supreme Court of Canada --- indeed, the point is made that it was the development of a “support structure” (in the form of privately funded rights advocacy organizations, federal and provincial programs that financed rights advocacy and litigation, and government rights enforcement agencies) which expanded the “access to the Supreme Court” that in fact helps explain the push towards the extension of judicially enforced rights in Canada.

This Paper will test the validity of both of the competing theories regarding the origins of Canada’s “rights revolution” post-1982. The analysis will be both quantitative and qualitative in nature. The validity of the two theories shall be tested via a survey of the civil liberties decisions of the Supreme Court of Canada in regards to those portions of the *Canadian Bill of Rights* not duplicated, (and thereby rendered moot), by the passage of the *Charter* in 1982.

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Presented at the 2008 Meeting of the Canadian Political Science Ass’c

June 4, 2008

INTRODUCTION

It is well known that the past few decades have witnessed the impressive growth of judicially expanded civil liberties protections in the United States. Starting in the early 1960's, under the leadership of then Chief Justice Earl Warren, the United States Supreme Court began a process of broadly expanding the meaning and scope of the rights enshrined in the *American Bill of Rights*. Nearly two decades later in 1982, Canada, perhaps prodded in part by the influences of its southern neighbor, undertook to enshrine civil liberties protections within its newly patriated Constitution. The resulting document, the *Canadian Charter of Rights and Freedoms*,¹ signaled a drastic shift in the attitudes of Canadian elites in regards to theories of governance and rights protection. The previous adherence to a Westminster system of parliamentary supremacy, relying on convention, the common law, and the democratic accountability of parliament as the supreme lawmaking authority to protect civil liberties, was replaced by an American model of a constitutional document of enumerated rights, protected and interpreted by the courts. This shift towards the judicial examination and interpretation of constitutionally enshrined rights has revolutionized the role of the Canadian judiciary, in particular the role of the Supreme Court of Canada as the highest judicial organ of the land.

The shift, or rather something akin to it, had been attempted once before in Canada. In 1960, the Canadian Parliament had enacted a statutory Bill of Rights, the *Canadian Bill of Rights*.² The Act contained a list of enumerated civil liberties (the grand majority of which would be replicated by the *Charter* some 20 years later) that were of binding effect on past and future federal laws.³ Heralded by civil libertarians, the *Canadian Bill of Rights* proved largely a failure. The judiciary, most notably the Supreme Court, was hesitant to enforce the rights contained in the document --- doubting both the extent of power they possessed under the Act, as well as the Act's status and hierarchy vis a vis the constitutional foundations of the state.⁴

The reception of the Canadian judiciary to the *Canadian Charter of Rights and Freedoms*⁵ has been wholly different versus that received by the *Canadian Bill of Rights*. Since 1982, and the promulgation of the *Charter*, a great many scholarly studies have arisen detailing the subsequent activity of the Supreme Court of Canada in the wake of its new powers. The result has not been in dispute --- post-1982 has seen the Supreme Court of Canada greatly expand the scope and substance of civil liberties in Canada through its broad judicial interpretation of the *Charter*. A Supreme Court that was once considered one of the more conservative branches of the Canadian government is today considered by far one of its most activist. What is in dispute however, is the reason behind the Supreme Courts vigorous protection of civil liberties in the wake of the passage of the *Charter*. Some commentators,

¹ Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

² *Canadian Bill of Rights*, S.C. 1960, c. 44.

³ *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 5(2).

⁴ PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* § 32.3 (a) (4th ed. 2001).

⁵ Hereinafter the *Charter*.

mainly notable constitutional law scholars, pin this shift towards the fact that the *Charter* constitutionally entrenched civil liberties, thereby giving the Supreme Court the legitimacy and cover to dramatically expand and enforce said rights.⁶ To this point, political scientists have developed an intriguing alternative. The main thrust of this theory is to argue that the *Charter* was the end result, not the catalyst, of the expansion of civil liberties by the Supreme Court of Canada.⁷ It is argued that it was the development of a “support structure” (in the form of privately funded rights advocacy organizations, federal and provincial programs that financed rights advocacy and litigation, and government rights enforcement agencies) which expanded the “access to the Supreme Court” that in fact helps explain the push towards the extension of judicially enforced rights in Canada.⁸ In deed, proponents of this latter theory argue that this “support structure” was already in place before the promulgation of the *Charter* in 1982, and that as a result, the extension of judicially enforced rights in Canada actually began in the late 1970’s --- well before the promulgation of the *Charter* in 1982.⁹

This Paper shall explore the question of how a system of vigorous judicial interpretation and enforcement of civil liberties, based upon rights enumerated in a constitutionally entrenched document, can flourish within a nominally Westminster system of parliamentary supremacy. In doing so, this Paper shall test the validity of both of the competing theories regarding the origins of Canada’s “rights revolution” post-1982. The analysis will be both quantitative and qualitative in nature. The validity of the two theories shall be tested via a survey of the civil liberties decisions of the Supreme Court of Canada in regards to those portions of the *Canadian Bill of Rights* not duplicated, (and thereby rendered moot), by the passage of the *Charter* in 1982.¹⁰ If the political scientists are correct, and the *Charter* was not the catalyst for the expansion of civil liberties by the Supreme Court of Canada, but rather the end result of the process, then one could hypothesize that there would be little or no difference in the decisions of the Supreme Court of Canada on those rights remaining operable from the *Canadian Bill of Rights*, versus the rights found in the *Charter*. The premise can be easily tested. Quantitatively, all of the civil liberties decisions of the Supreme Court between 1982 and the present day could be surveyed. A comparison could then be made between the civil liberty claims based on rights found in the *Charter*, compared to civil liberty claims based on rights found in the *Canadian Bill of Rights*. Did the Court have more of a propensity to uphold rights based on which document they originated from, thereby verifying the view that it indeed was the *Charter* that acted as the catalyst for the expansion of judicially protected civil liberties in Canada? Or rather did the Court uphold rights more or less equally, regardless of which document they originated from, verifying

⁶ See PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA § 32.3 (a) (4th ed. 2001); BERNARD W. FUNSTON & EUGENE MEEHAN, CANADA’S CONSTITUTIONAL LAW 161-164 (2nd ed. 1998).

⁷ See Charles R. Epp, *Do Bills of Rights Matter? The Canadian Charter of rights and Freedoms*, 90 AM. POL. SCI. REV. 765 (1996); CHARLES R. EPP, THE RIGHTS REVOLUTION (The University of Chicago Press 1998).

⁸ EPP (1996), *supra* at 769-771; EPP (1998), *supra* at 171-186.

⁹ *Ibid.*

¹⁰ These provisions are three in number. Specifically, ss. 1(a) relating to due process protections for property, s. 1(b) relating to the right to equality under the law, and s. 2(e) relating to the guarantee of a fair hearing for the determination of rights and obligations.

the theory forwarded by the aforementioned political scientists that there was there a “rights revolution” across the board?

I. Research Design

Looking at the debating theories between the importance of the context of rights presented above, the question which naturally emerges is how one can go about testing the two debating theories against one another. The two competing theories explaining the shift in the attitudes of the Supreme Court of Canada, from a conservative judicial body characterized by its restraint in giving broad reading to civil liberty claims, into a more dynamic body ready to expand civil liberties, can indeed be tested. The promulgation of the constitutionally enshrined *Charter* in 1982 did not expressly repeal the statutory *Canadian Bill of Rights*. While the *Charter* replicated the majority of the protections enshrined in the *Canadian Bill of Rights*, thereby rendering them moot, it did not do so with all of the *Canadian Bill of Rights* provisions. Specifically, s. 1(a) relating to due process protections for property, s. 1(b) relating to the right to equality under the law, and s. 2(e) relating to the guarantee of a fair hearing for the determination of rights and obligations, remained. If one were then to survey the Supreme Court of Canada’s civil liberties decisions for a set time period since the passage of the *Charter*, (i.e. c. 1982-1997), and segregate them according to claims made based upon the *Charter* versus claims made based upon the *Canadian Bill of Rights*, one could easily test the two rival theories. Did the Court have more of a propensity to uphold rights based on which document they originated from, thereby verifying the view that it indeed was the *Charter* that acted as the catalyst for the expansion of judicially protected civil liberties in Canada? Or rather did the Court uphold rights more or less equally, regardless of which document they originated from, verifying the theory that there was there a “rights revolution” across the board? The independent or causal variable for the purposed test would consist of the document the rights claim originated from, with the dependant or effectual variable for the purposed test consisting of the whether the Court upheld the rights claim of the petitioners or not.

II. The Protection and Enforcement of Civil Liberties in Canada Under the *Canadian Bill of Rights*

A. Background: The Adoption of the *Canadian Bill of Rights*

The framers of Canada’s original constitutional document, the *British North American Act*¹¹ (c. 1867), specifically rejected the model of an enumerated Bill of rights on the American Model, and instead opted for a model that would entrust the protection of civil liberties to the wisdom of parliament. What the framers of the *British North American Act*¹² did set out to do was categorize an extensive list of enumerated federal and provincial powers. This final point is important because it describes the origins of what would come to be the only judicial review power of the Supreme Court of Canada prior to the adoption of the *Charter* in 1982 --- judicial review on federalism grounds. Thus, pursuant to the *B.N.A. Act*, the Supreme Court of Canada,

¹¹ *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3.

¹² Hereinafter *B.N.A. Act*.

prior to the adoption of the *Charter* in 1982, did have the power to strike down either federal or provincial laws for legislating in areas of competence reserved for the other level.

The absence of a constitutionally entrenched Bill of Rights did not cause much concern in Canada until after the Second World War and the adoption of the *Universal Declaration of Human Rights* by the United Nations.¹³ One of the earliest Canadian advocates for an enumerated Bill of Rights was a young MP by the name of John Diefenbaker, who in 1945 took to the floor of parliament calling for such a document.¹⁴ In the federal election of 1958, the same John Diefenbaker, as head of the Progressive-Conservative Party, made the introduction of a Bill of Rights for Canada one of the central planks of his campaign.¹⁵ The promise was a rash one, as the process for amending the *B.N.A. Act* required not only the consent of all of Canada's fractious provinces, but a special act of the U.K. parliament as well. Realizing these obstacles, in 1960, the recently elected Progressive-Conservative government of Prime Minister John Diefenbaker instead introduced a statutory *Canadian Bill of Rights* through a simple parliamentary vote. The *Bill* itself was impressive, and had binding effect on all past and future federal statutes. Drafted by a special joint committee of both houses of parliament (i.e. the Senate and House of Commons), it took to an extensive study of the enumerated Bills of Rights of nations around the world,¹⁶ eventually producing an impressive document that protected a wide range of civil liberties --- from freedom of speech and religion, to freedom from cruel and unusual punishment.

B. Enforcement of the *Canadian Bill of Rights* by the Courts

Despite the impressive and admirable list of civil liberties protections afforded by the *Canadian Bill of Rights*, the document contained a number of drawbacks. Most glaringly, the *Canadian Bill of Rights* applied only to federal laws, leaving provincial acts immune from its scrutiny. Also, the *Bill* was unclear as to what was its effect on federal statutes that violated its protections.¹⁷ Section 2 of the *Canadian Bill of Rights* stated the effect of the *Bill* on inconsistent statutes as follows:

Every law of Canada shall...be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognized and declared[.]¹⁸

¹³ HOGG (2001), *supra* at § 32.1.

¹⁴ WALTER SURMA TARNOPOLSKY, *THE CANADIAN BILL OF RIGHTS* 12 (2nd ed. 1975).

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ For a more detailed discussion See HOGG (2001), *supra* at § 32.3 (a).

¹⁸ *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2.

Did the *Canadian Bill of Rights* then provide the courts with the power to over-ride inconsistent federal statutes, or was it to be used merely as a tool of statutory interpretation? In other words, did the *Canadian Bill of Rights* provide to the courts full powers of judicial review on those civil liberties provisions contained in the *Bill*, or rather was it in the power of the courts merely to construe statutes in a way as to not conflict with the *Bill*, and then apply it?¹⁹ These questions of construction and effect proved for the most part moot, as the *Canadian Bill of Rights* was thoroughly ignored by both lower courts reluctant to give it effect, and the Supreme Court of Canada unsure as to what the effect was.²⁰ In the few cases that were brought to the Supreme Court before 1969, the Court viewed the *Canadian Bill of Rights* solely as a tool of statutory interpretation. Interestingly, the question of whether the *Canadian Bill of Rights* granted to the courts the power to over-ride inconsistent federal statutes was resolved in 1969 when the Supreme Court of Canada ruled in the case *R. v. Drybones*,²¹ that it did indeed have the power under the *Canadian Bill of Rights* to render federal legislation which conflicted with it “inoperative.”²² Despite the ruling however, the Supreme Court’s jurisprudence remained limited in scope and conservative in outcome. From 1969 to 1982, the Supreme Court never again utilized its new self-given power to render a federal statute “inoperative,” and rather sank back into a predictable pattern of using the *Canadian Bill of Rights* solely as a tool of statutory interpretation. In the few cases that came before it raising the *Canadian Bill of Rights*, the Supreme Court would err on the side of caution. Where the civil libertarian value could be upheld without holding any federal law inoperative (e.g. the law was silent on the point at issue), then the law was so construed and applied as to uphold the civil libertarian value;²³ where this could not be achieved, the federal law was upheld.^{24, 25}

III. The Protection and Enforcement of Civil Liberties in Canada Under the *Canadian Charter of Rights and Freedoms*

A. Background: The Adoption of the *Canadian Charter of Rights and Freedoms*

The reluctance of the Supreme Court to forcefully apply the *Canadian Bill of Rights* led directly to several movements to patriate the country’s original constitutional document, the

¹⁹ HOGG, *supra* at § 32.3 (a).

²⁰ TARNOPOLSKY, *supra* at 14.

²¹ *R. v. Drybones*, [1970] S.C.R. 282.

²² *Id.* at 294-295.

²³ See *R. v. Appleby*, [1972] S.C.R. 303; *Curr v. The Queen*, [1972] S.C.R. 889; *Duke v. The Queen*, [1972] S.C.R. 917; *Hogan v. The Queen*, [1975] 2 S.C.R. 574.

²⁴ See *Brownridge v. The Queen*, [1972] S.C.R. 926; *Lowry and Lepper v. The Queen*, [1974] S.C.R. 195; *A.G. Ont. v. Reale*, [1975] 2 S.C.R. 624.

²⁵ Peter W. Hogg comes to an identical conclusion in the 1977 Edition of his canonical Treatise. See PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* § 25.5 (b) (1st ed. 1977).

B.N.A. Act, from the U.K., and incorporate a constitutionally enshrined Bill of Rights within it.²⁶ The first attempt, in 1971, failed due to the intransigence of Quebec Premier Robert Bourassa who objected to the proposed document's failure to give protections over Quebec's jurisdiction over its own separate provincial social welfare programs.²⁷ The second attempt, in 1982, passed due to the fact that the unanimous consent of all of the country's provinces was no longer required for patriation.²⁸ Regardless, through a marathon session of negotiations, the federal government was able to garner the support of nine out of the ten provinces (the lone holdout again being Quebec) and submit its proposal for patriated Constitution to the U.K. Parliament, which was approved on April 17, 1982 by Royal Proclamation.²⁹ The new constitutionally enshrined Bill of Rights, the *Canadian Charter of Rights and Freedoms* was notable in its obvious improvements over the *Canadian Bill of Rights*. It was not the nature of the rights enshrined that signaled the improvement, the *Canadian Bill of Rights* in many respects offered more protections than did the *Charter* (especially in regards to due process guarantees), rather it was the fact that the *Charter* was a constitutional document that clearly established the parameters of judicial oversight over the rights it purported to protect. Whereas the *Canadian Bill of Rights* was unclear as to its effect on inconsistent statutes (*See* § II(B) above), the *Charter* clearly stated that they were to be over-ridden.³⁰ Whereas the *Canadian Bill of Rights* was a mere statute that could be repealed by parliament at any time, the *Charter* was a part of the Constitution of Canada, and could be amended only through a complicated procedure requiring both provincial, as well as federal consent.

B. Enforcement of the *Canadian Charter of Rights and Freedoms* by the Courts: Two Theories

It is clear that the jurisprudence of the Supreme Court of Canada has changed in the past few decades. What was once one of the more conservative branches of government has changed into one of its most dynamic. It is beyond debate that the Supreme Court of Canada has transformed into an institution ever ready to give reading to and expand civil liberties protections, what is at debate is the role of the *Charter* in this transformation. Within this debate there are two primary views on the role of the *Charter* in the transformation of the Supreme Court of Canada into a forceful protector of civil liberties.

1. The *Charter of Rights and Freedoms* as the Catalyst for the Expansion of Civil Liberty Protections by the Supreme Court of Canada

²⁶ HOGG (2001), *supra* at § 33.1 (a).

²⁷ TARNOPOLSKY, *supra* at 19.

²⁸ *See Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

²⁹ GERALD L. CALL, *THE CANADIAN LEGAL SYSTEM* 64 (4th ed. 1995).

³⁰ *See Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 52(1).

The first view, forwarded by mainstream Canadian constitutional law scholars such as Peter Hogg, Bernard Funston, and Eugene Meehan, holds that it was the *Charter* itself that set in motion the judicial expansion and protection of civil liberties in Canada. According to these scholars it was the constitutional status of the *Charter*, coupled with its clear laying out of the powers afforded to the judiciary in enforcing the rights enumerated within, that proceeded to offer the mechanism for the Supreme Court of Canada to broadly interpret and enforce the rights contained within it. According to this reading, it was the *Charter* itself, as a constitutional document establishing clear boundaries within which judicial action could be undertaken, that acted as a catalyst for the subsequent expansion of civil liberties protections by the Supreme Court of Canada after 1982.

2. The *Charter of Rights and Freedoms* as the End Result of the Expansion of Civil Liberty Protections by the Supreme Court of Canada

The second view, most notably forwarded by the political scientist Charles Epp, offers an altogether more intriguing alternative to the more mainstream view forwarded by Hogg, Funston, Meehan, and others. As Epp sees it, the promulgation of the *Charter* was a final step, not a beginning. According to Epp, the promulgation of the *Charter* in 1982 came in wake of a period that had already witnessed an intense growth in the use of the courts as a vehicle for the protection of civil liberties in Canada. The *Charter* then, was the natural culmination of this movement, rather than the catalyst that set it off. The main thrust of Epp's argument is that the judicial expansion of civil liberties, cannot occur without a "support structure" that makes possible "sustained, strategic appellate litigation."³¹ Epp argues that it was the development of this "support structure" (in the form of privately funded rights advocacy organizations, federal and provincial programs that financed rights advocacy and litigation, and government rights enforcement agencies) which in turn expanded "access to the Supreme Court" that in fact helps explain the push towards the extension of judicially enforced rights in Canada both *before* and after the passage of the *Charter*.³²

Epp backs up his theory with impressive numbers, with several of his datasets standing out as particularly supportive of his conclusions: (1) Through a quantitative survey of the Supreme Court of Canada's cases from 1960-1990, Epp finds that there was a noticeable expansion in rights claims based on non-*Charter* sources (i.e. the *Canadian Bill of Rights*, federalism review, etc.), not only before the passage of the *Charter*, but after its passage as well.³³ (2) Through a survey of the percentage of civil liberties cases that composed the Supreme Court's docket between 1960-1990, Epp discovers that the growth rate of what he categorizes as civil liberties cases (as a portion of the Court's docket) was only marginally lower during the immediate pre-*Charter* period of 1975-1980 (78%) than it was during the immediate post-*Charter* period of 1980-1985 (86%).³⁴ (3) In researching the Supreme Courts use of its judicial

³¹ EPP (1996), *supra* at 765.

³² *Id.* at 769-771

³³ *Id.* at 773-774.

³⁴ *Id.* at 772, 773.

review power, Epp finds that the largest increase occurred between 1975 and 1980 (a five-fold increase, from one law “struck down” in 1975, to five in 1980).³⁵

IV. Testing the Two Competing Theories

To test the two competing theories, the 358 *Charter* and *Canadian Bill of Rights* decisions of the Supreme Court of Canada between 1982 and 1997 were tested against each other through a detailed statistical comparison.

A. Statistically Testing the Supreme Court of Canada’s Civil Liberty Decisions in Relation to Claims Made Based Upon the *Charter of Rights and Freedoms* (c. 1982-1997)

In testing the Supreme Court of Canada’s attitudes (c. 1982-1997) towards rights claims (directly challenging legislation) made based upon the *Charter*, the following results were generated (based on the work of previous scholars)³⁶:

Figure 1: Supreme Court of Canada’s Charter cases (c. 1982-1997)

| Total Number of Charter Claims | Claims Upheld / (Percentage of Total) | Claims Rejected / Percentage of Total |
|--------------------------------|---------------------------------------|---------------------------------------|
| 352 | 117 / (33%) | 235 / (67%) |

Out of a total of 352 cases directly invoking the *Charter* to challenge legislation brought before the Supreme Court of Canada between 1982-1997, the Court ruled against the claimants in 235 of them. Thus, in cases invoking the *Charter* to directly challenge legislation, the Court ruled for the claimants 33% of the time, and therefore against them 67% of the time.

B. Statistically Testing the Supreme Court of Canada’s Civil Liberty Decisions in Relation to Claims Made Based Upon the *Canadian Bill of Rights* (c. 1982-1997)

In testing the Supreme Court of Canada’s attitudes (c. 1982-1997) towards rights claims (directly challenging legislation) made based upon those provisions of the *Canadian Bill of Rights* still operable after the *Charter*’s promulgation in 1982, the following results were generated:

Figure 2: Supreme Court of Canada’s Bill of Rights cases (c. 1982-1997)

| Total Number of Bill of | Claims Upheld / (Percentage | Claims Rejected / Percentage |
|-------------------------|-----------------------------|------------------------------|
|-------------------------|-----------------------------|------------------------------|

³⁵ *Ibid.*

³⁶ See James B. Kelly, *Charter Activism and Canadian Federalism: Rebalancing Liberal Constitutionalism in Canada, 1982 to 1997* (1998) (unpublished Ph.D. dissertation, McGill University) (on file with the Library of Canada).

| | | |
|---------------|-----------|-----------|
| Rights Claims | of Total) | of Total |
| 6 | 1 / (17%) | 5 / (83%) |

Out of a total of six cases directly invoking the *Canadian Bill of Rights* to challenge legislation brought before the Supreme Court of Canada between 1982-1997, the Court ruled against the claimants in five of them. Thus, in cases invoking the *Canadian Bill of Rights* to directly challenge legislation, the Court ruled for the claimants 17% of the time, and therefore against them 83% of the time. Within these results, something must be said about the small size of the survey. While six cases is indeed a small amount, it should be kept in mind that this number is not a sample. The cases surveyed comprised the totality of the Supreme Court of Canada's direct review of the *Canadian Bill of Rights* in the 1982-1997 period. The fact that only six cases were brought before the court in fifteen years, is perhaps another piece of evidence suggesting the relative esteem, or lack thereof, the *Canadian Bill of Rights* was held in, both by potential litigants and by the Court itself during this time. Due to the small size of the survey, and the fact that the Supreme Court upheld a *Canadian Bill of Rights* based challenge to legislation in just a single case, a closer inspection of the six cases (as well as single outlier) is warranted:

Figure 3: Detailed Breakdown of the Supreme Court of Canada's Bill of Rights cases (c. 1982-1997)

| Case | Question | Decision |
|---|--|----------|
| <i>Singh v. Minister of Employment and Immigration</i> , [1985] 1 S.C.R. 177. | Do procedures for the adjudication of refugee status claims set out in the <i>Immigration Act</i> infringe upon the right to a fair hearing guaranteed under s. 2(e) of the <i>Canadian Bill of Rights</i> ? | YES |
| <i>Beauregard v. Canada</i> , [1986] 2 S.C.R. 56. | Does s. 29.1 of the <i>Judges Act</i> , establishing different pension compensatory schemes for judges based upon their date of appointment, infringe upon the right to equality under the law guaranteed in s. 1(b) of the <i>Canadian Bill of Rights</i> ? | NO |
| <i>P.S.A.C. v. Canada</i> , [1987] 1 S.C.R. 424. | Does the <i>Public Sector Compensation Restraint Act</i> , extending compensation programs (i.e. Collective Bargaining Agreements) already in force for public sector employees by two years, infringe upon the right to equality under the law guaranteed in s. 1(b) of the | NO |

| | <i>Canadian Bill of Rights?</i> | |
|---|---|----|
| <i>R. v. Cornell</i> , [1988] 1 S.C.R. 461. | Did the non-universal proclamation of s. 234.1 of the <i>Criminal Code</i> , respecting mandatory roadside sobriety testing, infringe upon the right to equality under the law guaranteed in s. 1(b) of the <i>Canadian Bill of Rights?</i> | NO |
| <i>R. v. Hufsky</i> , [1988] 1 S.C.R. 621. | Did the non-universal proclamation of s. 234.1 of the <i>Criminal Code</i> , respecting mandatory roadside sobriety testing, infringe upon the right to equality under the law guaranteed in s. 1(b) of the <i>Canadian Bill of Rights?</i> | NO |
| <i>R. v. Luxton</i> , [1990] 2 S.C.R. 711. | Did s. 214(5)(e) of the <i>Criminal Code</i> , establishing an automatic charge of 1 st degree murder, irrespective of planning or deliberation, if a murder was committed in the furtherance of a kidnapping, infringe upon the right to a fair hearing guaranteed under s. 2(e) of the <i>Canadian Bill of Rights?</i> | NO |

In a closer inspection of the outlier, *Singh v. Minister of Employment and Immigration*,³⁷ a very interesting fact comes to light. The claimants in this case were persons claiming refugee status in Canada. According to the process outlined in the *Immigration Act*,³⁸ they were not entitled to an oral hearing before the official empowered to decide upon their claim. In challenging the refugee-determination process of the *Immigration Act*, the claimants invoked not only s. 2(e) of the *Canadian Bill of Rights*, but also s. 7 of the *Charter*, guaranteeing the rights of life, liberty, and security in accordance with “principles of fundamental justice.” The Court ruled in favor of the claimants and over-rode the offending portions of the *Immigration Act*. What is interesting is the basis for which this decision was reached. Wilson J., in an opinion joined by Dickson C.J. and Lamer J., based his decision on s. 7 of the *Charter*, making no mention of the *Canadian Bill of Rights*.³⁹ On the other hand, Beetz J., in an opinion joined by Estey and

³⁷ *Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

³⁸ *Immigration Act*, 1976, 1976-77, c. 52, ss. 2, 3(g), 4, 5(1), 23, 27, 32, 37, 45-48, 55, 70, 71-72.

³⁹ *Singh*, [1985] 1 S.C.R. at 212, 220-221

McIntyre JJ., based his decision on s. 2(e) of the *Canadian Bill of Rights*, feeling that the rights protected in s. 7 of the *Charter* were not affected by the refugee-determination process of the *Immigration Act*.⁴⁰ The majority then was evenly split, with three justices ruling in favor of the claimants based on the s. 7 rights guaranteed by the *Charter*, and three justices ruling in favor of the claimants based on the s. 2(e) rights guaranteed by the *Canadian Bill of Rights*. It is clear then that part of reason the Court ruled favorably towards the rights claimants in this case had to do with rights protections claimed under the *Charter*. As such, it is not inconceivable to claim that in this one outlying case where the *Canadian Bill of Rights* was given wide-ranging effect, the influences and effects of the *Charter* were still ever present.

C. Explaining the Results

From the initial results of the test, it is clear that, during the period 1982-1997, the Supreme Court of Canada was moderately more likely to uphold a civil liberty claim based on the constitutionally entrenched *Charter*, than it was likely to uphold a civil liberty claim based upon the statutory *Canadian Bill of Rights*. The Court ruled in favor of rights claimants in *Charter* based cases 33% (117/352) of the time during this period, while it ruled in favor of *Canadian Bill of Rights* claimants only 17% (1/6) of the time. However, upon a more detailed examination of the one case based on the *Canadian Bill of Rights* in which the Court ruled in favor of the claimant, *Singh v. Minister of Employment and Immigration*,⁴¹ it was seen that the Court was swayed in part by the fact that the petitioner was claiming a right protected under the *Charter* in addition to one protected under the *Canadian Bill of Rights*. As we saw, the majority decision in *Singh*⁴² was in fact split, with three justices ruling in favor of the claimants based on the s. 7 rights guaranteed by the *Charter*, and three justices ruling in favor of the claimants based on the s. 2(e) rights guaranteed by the *Canadian Bill of Rights*. Indeed, under such circumstances, it would not be out of line to exclude *Singh v. Minister of Employment and Immigration*,⁴³ the lone *Canadian Bill of Rights* case in which the Supreme Court of Canada ruled on behalf of the claimant, out of the analysis. Under these circumstances, one can see that in fact the Court ruled in favor of rights claimants in *Charter* based cases 33% (117/352) of the time during this period, while it ruled in favor of *Canadian Bill of Rights* claimants 0% (0/4) of the time. It is clear that, during the period 1982-1997, the Supreme Court of Canada was much more likely to uphold a civil liberty claim based on the constitutionally entrenched *Charter*, than it was likely to uphold a civil liberty claim based upon the statutory *Canadian Bill of Rights*. These results give validity to the theory forwarded by Peter Hogg, Bernard Funston, Eugene Meehan, and many others, that it was the *Charter* itself, with its constitutional status and well defined parameters establishing judicial oversight, that set in motion the judicial expansion and protection of civil liberties in Canada. This is in direct opposition to Charles Epp's theory that the expansion of judicially enforced rights in Canada began *prior* to the promulgation of the *Charter* in 1982, and was in fact due to the development of a "support structure" (in the form of

⁴⁰ *Id.* at 230-231.

⁴¹ *Singh*, [1985] 1 S.C.R 177.

⁴² *Ibid.*

⁴³ *Ibid.*

privately funded rights advocacy organizations, federal and provincial programs that financed rights advocacy and litigation, and government rights enforcement agencies) which in turn expanded “access to the Supreme Court.”

As previously noted, Epp does back up his theory with impressive data sets (SEE § III(B)(2) above).⁴⁴ What of those? If Epp’s theory is flawed, how is one to explain the seemingly incontrovertible data he presents in support? To sum up Epp’s numbers, he claims to demonstrate, through datasets surveying of the Supreme Court of Canada’s cases from 1960-1990, that in the 1975-1980 period (i.e. the period immediately preceding the passage of the *Charter*) the Supreme Court of Canada saw a tremendous increase in the portion (as a part of its docket) of what Epp categorizes as civil liberty cases --- this increase Epp claims, closely mirrors the increase in *Charter* based civil liberty cases that the Court experienced in the 1980-1985 period (i.e. post-*Charter*).⁴⁵ Such numbers would seemingly back up the claim that the expansion of judicially enforced rights in Canada began *prior* to the promulgation of the *Charter* in 1982. The discrepancy between the failure of Epp’s theory and the seemingly impressive datasets he presents in support of it can be explained if one delves deeper into what sort of cases Epp categorizes as “civil liberty” cases in the 1975-1980 period. Epp does not simply place cases which arose under the *Canadian Bill of Rights* into this category of “civil liberty” cases, as would be proper; instead he fills the category with not only cases which arose under the *Canadian Bill of Rights* (of which only eleven were brought forward to the Court in the 1975-1980 period),⁴⁶ but also the numerous cases which arose under the Court’s powers of federalism review under the *B.N.A. Act*.⁴⁷ These powers of judicial review under federalism grounds have existed for the Supreme Court of Canada since its creation in 1875. They simply consist of the power of the Court to interpret whether a challenged law was enacted by the correct level of government (i.e. federal versus provincial), under the federalism provisions set forth in the *B.N.A. Act*, reserving certain enumerated powers for the federal government, and others for the provinces.⁴⁸ This type of review has nothing to do with civil liberties and does not act as a constraint. If a law enacted by one level of government is struck down (i.e. for legislating in an area of competency reserved for the other level), the other level is free to then enact the law in question. As noted by Canadian constitutional law scholar Paul Weiler, if a civil liberty is at issue, in such circumstances the question is “which level should have the power to work the

⁴⁴ A serious deficiency in the data sets Epp presents must be noted however --- at no point does Epp actually list (for the benefit of the reader) the names of the actual cases he is referring to. Instead Epp only lists the number of “civil liberty” cases for each year in his data set, never the actual case names.

⁴⁵ See EPP (1996), *supra* at 772, 773.

⁴⁶ These eleven cases were the following: *Prata v. Minister of Manpower and Immigration*, [1976] 1 S.C.R. 376; *A.G. Canada v. Canard*, [1976] 1 S.C.R. 170; *Morgentaler v. The Queen*, [1976] 1 S.C.R. 616; *Mitchell v. The Queen*, [1976] 2 S.C.R. 570; *Jumaga v. The Queen*, [1977] 1 S.C.R. 486; *Miller et al. v. The Queen*, [1977] 2 S.C.R. 680; *CKOY Ltd. v. The Queen*, [1979] 1 S.C.R. 2; *Bliss v. A.G. Canada*, [1979] 1 S.C.R. 183; *Chomiak v. The Queen*, [1980] 1 S.C.R. 471; *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *MacKay v. The Queen*, [1980] 2 S.C.R. 370.

⁴⁷ See EPP, *supra* at 773-774.

⁴⁸ See *Constitution Act, 1867* (U.K.), 30 & 31 Victoria, c. 3, ss. 91, 92.

injustice, not whether the injustice should be prohibited.”⁴⁹ In including such cases within his dataset, Epp unwittingly inflates the numbers --- such cases have nothing to do with the question of whether the Supreme Court of Canada was more or less inclined to give wide reading to civil liberty protections during the period immediately preceding the passage of the *Charter* in 1982. The inclusion by Epp of such cases within his dataset can serve to explain the inconsistency between the invalidity of his theory, and the numbers he presents in support of said theory.

CONCLUSION

In conclusion, by testing the two competing theories on the origins of the transformation of the Supreme Court of Canada, from one of the more conservative branches of government, into an institution ever ready to give reading to and expand civil liberties protections, a seeming validation of one the theories has occurred. By testing the Supreme Court of Canada’s attitudes, during the period 1982-1997, towards rights claims based on the constitutionally entrenched *Charter*, versus the same Courts attitude towards claims based upon the statutory *Canadian Bill of Rights*, a clear confirmation of one of the two competing theories has happened. The validated theory, one forwarded by Canadian constitutional law scholars Peter Hogg, Bernard Funston, Eugene Meehan, and many others, holds that it was the entrenchment of an enumerated Bill of Rights into the Canadian Constitution, that set in motion the judicial expansion and protection of civil liberties in Canada. On the other side, the novel theory forwarded (most prominently) by political scientist Charles Epp, holding that the expansion of judicially enforced rights in Canada began *prior* to the promulgation of the *Charter* in 1982, and was in fact due to the development of a “support structure” (in the form of privately funded rights advocacy organizations, federal and provincial programs that financed rights advocacy and litigation, and government rights enforcement agencies) which in turn expanded “access to the Supreme Court,” has been seriously weakened. There is much positive to be said in regards to Epp’s arguments advocating the importance of a “support structure” in Canadian civil society for expanding access to the Supreme Court. It is where he claims that this “support structure” was able to affect the civil liberty jurisprudence of the Supreme Court of Canada independent of the *Charter* that his theory falls flat.

⁴⁹ Paul C. Weiler, *The Supreme Court and the Law of Canadian Federalism*, 23 U. TORONTO L.J. 307, 344 (1973).