

From Procedure to Policy
The Policy Impacts of Charter
Infringements



PRESENTER:

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BACKGROUND:

- Charter Cases at the Supreme Court of Canada (SCC) reshape policy, influencing areas from healthcare to sentencing minimums.
- The Courts can influence policy through these cases.
- Legal scholars have aimed to characterize the SCC’s decision-making through an adjudicative or policy-making model (Weiler, 1960; Manfredi, 1989)
- How do variations in the Supreme Court of Canada’s decision-making in ‘legal right’ cases influence the scope of Parliament’s legislative responses to Charter rulings?

METHODS

Examined section 7 (rights to life, liberty, and security), section 11(b) (right to trial within a reasonable time), and section 12 (right to be free subjected to cruel and unusual punishment).

Conducted a hand search through the SCC’s database for cases within 3 time periods:
- 2010-01-01-2015-11-04: (McLachlin/Harper)
- 2015-11-05-2017-12-17: (McLachlin/Trudeau)
- 2017-12-18-2022-12-31: (Wagner/Trudeau)

10 cases were chosen, coded by proof of indicators, then given a score

Hansards, committee reports, and Charter statements were examined following the rulings of these cases.

RESULTS

Case Categories	Adjudicative cases (overall)	Policy-making cases (overall)
Section 7	2	2
Section 11(b)	0	2
Section 12	1	3

DISCUSSION

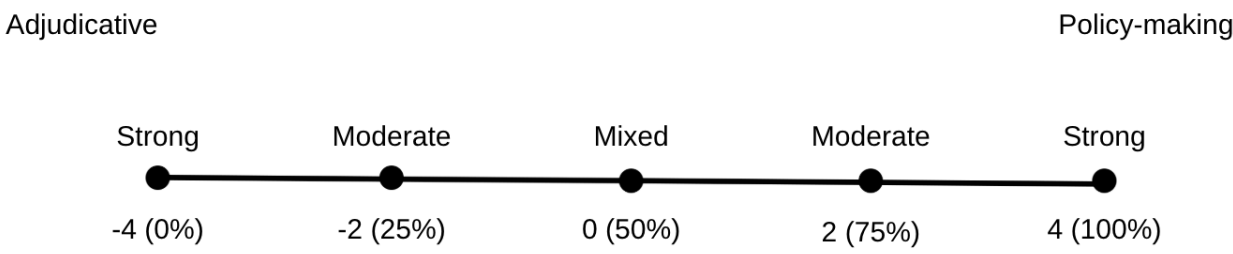
- Despite popular belief that section 7 serves as the primary site for judicial policy-making, section 12 appears to follow the policy-making model more consistently in recent years.
- Further research can build on examining the legislative response farther than proof of concept or examine other sections of the Charter of Rights and Freedoms under this framework.

MAIN FINDINGS

Section 7 (Rights to Life, Liberty, and Security) Cases						
Cases	Time Period	Nature of the dispute	Legal-bound or policy based reasoning:	Deference to institutions	Doctrinal Change	Overall Score
Canada v. Harkat (2014)	McLachlin/ Harper	Private (-1)	Legal-bound (-1)	High (-1)	No change (-1)	-4 (Strong adjudicative)
Carter v. Canada (2015)	McLachlin/ Harper	Societal (+1)	Policy based (+1)	Low (+1)	Change occurred (+1)	+4 (Strong policy-making)
India v. Badesha (2017)	McLachlin/ Trudeau	Private (-1)	Legal-bound (-1)	Mixed (0)	No change (-1)	-3 (Strong-moderate adjudicative)
Ewert v. Canada (2018)	Wagner/ Trudeau	Societal (+1)	Policy based (+1)	Mixed (0)	Mixed (0)	+2 (Moderate policy-making)
Section 11(b) (Right to Trial within a Reasonable Time) Cases						
Cases	Time Period	Nature of the dispute	Legal-bound or policy based reasoning:	Deference to institutions	Doctrinal Change	Overall Score
R v. Jordan (2016)	McLachlin/ Trudeau	Societal (+1)	Legal-bound (-1)	Low (+1)	Change occurred (+1)	+2 (Moderate policy-making)
R v. KJM (2019)	Wagner/ Trudeau	Societal (+1)	Policy based (+1)	Low (+1)	No change (-1)	+2 (Moderate policy-making)
Section 12 (Right to be Free from Cruel and Unusual Punishment) Cases						
Cases	Time Period	Nature of the dispute	Legal-bound or policy based reasoning:	Deference to institutions	Doctrinal Change	Overall Score
R v. Nur (2015)	McLachlin/ Harper	Societal (+1)	Policy based (+1)	Low (+1)	Change occurred (+1)	+4 (Strong policy-making)
R v. Lloyd (2016)	McLachlin/ Trudeau	Societal (+1)	Policy based (+1)	Low (+1)	Change occurred (+1)	+4 (Strong policy-making)
R v. Boudreault (2018)	Wagner/ Trudeau	Societal (+1)	Policy based (+1)	Mixed (0)	Change occurred (+1)	+3 (Strong-moderate policy-making)
Quebec v. 9147-0732 Québec Inc. (2020)	Wagner/ Trudeau	Societal (+1)	Legal-bound (-1)	High (-1)	No change (-1)	-2 (Moderate adjudicative)

Green = Policy-making
Purple = Adjudicative

Scale used for scoring:



INDICATORS: Each dimension is scored on a scale from –1 (adjudicative) to +1 (policy-oriented).

Nature of the dispute: The Court focuses on either the individual claimant/defendant, or big picture societal implications.

- 1 focuses on the individual
- +1 considers societal implications

Legal-bound or policy-based reasoning: The Court considers only the factual record and existing case law or incorporates on external evidence such as scientific data or academic commentary.

- 1 focuses on relevant facts/case law
- +1 considers external evidence

Deference to institutions: The Court defers to Parliament on the ‘final say’ of the issue or asserts its own constitutional judgement.

- 1 high deference to other bodies
- +1 low deference to other bodies

Doctrinal change: The Court adheres to existing frameworks/jurisprudence or strikes down previously established legislative schemes.

- 1 refers to no change in the existing legal framework
- +1 refers to some form of change in the existing legal framework

EXAMINING LEGISLATIVE RESPONSE:

- Collaboration occurs when Parliament adopts policy-making arguments from the Courts, as seen through agreement in debates or arguments articulated in committee reports
- Backlash arises when Parliament argues against the Courts decision, causing friction through disagreement in debates or minimal change to wider policy concerns as raised by the Court.

REFERENCES

Manfredi, C. P. (1989). Adjudication, Policy-Making and the Supreme Court of Canada: Lessons From the Experience of the United States. *Canadian Journal of Political Science*, 22(2), 313–336. <https://doi.org/10.1017/S0008423900001323>.
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